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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DOROTHY ARN,

Petitioner,

v.

PAMELA D. GREEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A DEFENSE COUNSEL WHO ABSENTS HIMSELF FROM MINUTES OF A TRIAL HAS COMMITTED CONSTITUTIONAL ERROR *PER SE*.

PARTIES

The Petitioner in this action is Dorothy Arn in her capacity as Superintendent of the Ohio Reformatory for women at Marysville, Ohio[1]. The Respondent is Pamela Green.

[1] The original party having custody over respondent was Dorothy Arn, the Superintendent of the Ohio Reformatory for Women. Petitioner notes, however, that respondent has been paroled since the filing of this action.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Green v. Arn*, 809 F.2d 1257 (6th Cir. 1987). (A-1). The decision of the United States District Court for the Northern District of Ohio, Eastern Division, is reported as *Green v. Arn*, 615 F.Supp. 1231 (D.C. Ohio 1985). (A-20). The United States Magistrate's Report and Recommendation is unreported. (A-30). The decision of the Ohio Court of Appeals for the Eighth Judicial District is unreported. (A-68).

JURISDICTION

The opinion of the United States Court of Appeals was entered on January 27, 1987. Jurisdiction is conferred pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DOROTHY ARN,

Petitioner,

v.

PAMELA D. GREEN,

Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio to review the decision of the United States Court of Appeals for the Sixth Circuit in *Green v. Arn,* 809 F.2d 1257 (6th Cir. 1987). Therein, a 2-1 majority of the circuit court affirmed the judgment of the United States District Court for the Northern District of Ohio and ordered that respondent be released from custody unless retried for the crimes of kidnapping and gross sexual imposition.

The facts which give rise to this controversy reflect that on September 22, 1982, two persons independently responded to the following advertisement in the classified section of the Cleveland Plain Dealer, "Receptionist, over 18, for body shop, no typing, will train, 721-4418." (Tr. 138, 141, 218, 260). After doing so, a similar chain of events occurred with both individuals.

Vicki Steadman answered the ad by phone about 10:00 a.m. and spoke with respondent who thereafter drove to Lyndhurst, picked up Vicki and took her to the interview. (Tr. 312). When they arrived at 9418 Buckeye Road, respondent introduced Vicki to Jovan, Wendy Rodgers' four-year-old son, and later

told Jovan to stay in his bedroom. Respondent then introduced Vicki to Otis Rodgers. (Tr. 320-322).

Otis talked with Vicki about her prior job experience and asked her if she had ever been a hooker. (Tr. 323). Otis explained that if Vicki had any problems on the job that she should see him because they were all like a big family. (Tr. 323). Respondent, Otis, and Vicki then shared a marijuana joint. (Tr. 324-325).

Otis told Vicki to stand up so he could see how tall she was. He tried kissing her, but Vicki successfully pushed him away. (Tr. 326). Otis next grabbed Vicki by the hand, led her into the bedroom, pulled her next to him on the bed, and again started kissing her despite Vicki's determined resistance. (Tr. 327). Otis then pulled Vicki's sweater off, unhooked her bra and started fondling her breasts. (Tr. 327-328). A petrified Vicki warned Otis that she was having her period. (Tr. 328). Otis responded, "Well, I have to get my rocks off some way. You turn me on." (Tr. 328). Otis laid Vicki on the bed, put his knees on her arms and ejaculated on her chest. (Tr. 328-329). After Otis finished, Vicki cleaned herself up, got dressed and returned to the living room. (Tr. 329).

For her own safety, Vicki told Otis she would think about the job and let him know the next day whether she wanted it. (Tr. 330, 382). She tried calling her boyfriend for a ride home, but there was no answer. (Tr. 330). Respondent and Otis then drove Vicki home. (Tr. 331).

Respondent's September 22, 1982 acts of perversity were not limited to Vicki Steadman. Later that day at around 2:00 p.m., Maureen McNea responded to the newspaper ad. She was told that the receptionist job had been filled, but that a babysitting job was available. (Tr. 138, 142).

That afternoon, respondent came out to Maureen's house in Fairview Park and talked with Maureen about the job, and respondent's four (4) year old son whom she described as a

brat. (Tr. 144-145). Respondent then drove Maureen to a home located at 9418 Buckeye Road, an area of which Maureen was totally unfamiliar. Once inside, respondent introduced Maureen to Jovan. (Tr. 150). Later, Maureen met Wendy Rodgers.

After some brief conversation with Wendy, a black male named "Robert" appeared. At trial, Robert was identified as Otis Rodgers. (Tr. 151-152). Otis asked Maureen her age and weight, and told her that she needed to lose some weight. (Tr. 152). Otis assured her though that she wouldn't have to excerise because he would get her some speed. (Tr. 153).

Soon thereafter, Otis Rodgers left the room, and Maureen immediately asked respondent to take her home. (Tr. 153) Respondent refused Maureen's request and claimed that the car was being repaired. Respondent then left the room and Maureen repeatedly tried to phone a friend for a ride hime, but the line was busy each time she tried. (Tr. 153-154).

Respondent then ordered Maureen into the bathroom and told her to sit down by the tub where a naked Otis "wanted to get to know her better". (Tr. 154). Upon viewing Otis' bare state, Maureen fled the bathroom. (Tr. 154). Respondent then grabbed Maureen's arm and demanded, "What the hell is wrong with you?" (Tr. 154-155). Maureen pleaded that she just wanted to go home. (Tr. 155). Deceitfully, respondent promised to drive Maureen home if she wouldn't use the phone. (Tr. 155).

Respondent then ordered Maureen back into the bathroom where she observed respondent sitting on top of Otis having intercourse in the bathtub while Wendy was washing respondent's back. (Tr. 156). Maureen promptly returned to the living room while respondent and her cohorts laughed derisively. (Tr. 156).

The phone was ringing at that point and the girls asked Maureen to answer it and take a message. (Tr. 157). Maureen was told to take down the callers name and write down if they were black, white or Chinese. (Tr. 157). Soon thereafter,

respondent, Otis and Wendy emerged from the bathroom, all clothed by a mere towel. Maureen pleaded to use the phone, but Otis put his leg over it and laughed. (Tr. 159).

Wendy and Otis then grabbed Maureen and threw her into the bedroom. (Tr. 160). They told Maureen it was time for her "initiation". (Tr. 160). Otis sat Maureen on the bed and talked of trust and prostitution as he appeared to be getting angry. (Tr. 161-162). Otis told her she did not have time to think about it and that he had to go to bed with her so that he could trust her with other men. (Tr. 162). Maureen told Otis the trust was going one way and begged Otis to let her go home and think about it. (Tr. 162-163). Otis responded that he was sick of Maureen's excuses, and would kill her if she refused to comply with his demands. (Tr. 171-172).

Maureen told Otis she just couldn't go to bed with him like that and Otis replied, "What the hell is wrong with you? I don't want to be your boyfriend. It will just take five minutes. All you have to do is either give me a blow job or let me get on top of you". (Tr. 172). At that point respondent and Wendy came into the bedroom, forced Maureen down on the bed and began undressing her (Tr. 173). Otis undressed and respondent advised Maureen to make it easy on herself. (Tr. 173). Otis tried to kiss Maureen but once again the attack was fought off. (Tr. 174). Otis next seized Maureen between her legs, but a kicking Maureen somehow managed to escape respondent's grasp as Otis masturbated and ejaculated on himself. (Tr. 173).

After Otis had masturbated on himself, respondent and Wendy left the bedroom and said they had to go to "work". (Tr. 176). Instinctively sensing an escape opportunity, Maureen told them to call her tomorrow to finalize their plans for the trip to Dallas. (Tr. 176). Otis then dropped the girls off and drove Maureen home. (Tr. 176). Maureen got home and hysterically told her parents of the sexual torture to which she had been subjected. (Tr. 177). The police were called that night and Maureen made a full report. (Tr. 178).

At trial, Cleveland Police Detective Norman Sherwood testi-

fied that he and Sgt. Markey were assigned this case upon their report to work at 8:00 a.m. on September 23, 1982. (Tr. 406). Detective Sherwood went to interview Maureen, who had filed a police report the previous evening, and told her to play along with respondent when she called. (Tr. 406-407). Respondent thereafter arrived at Maureen's home where she was promptly arrested. (Tr. 407-408).

Detective Sherwood further testified that Otis Rodgers and Wendy Rodgers were arrested at 9418 Buckeye Road after they had been identified by Maureen. (Tr. 411). Upon arrest, Otis Rodgers admitted that "the little white girl" (Maureen) had been to his house regarding the receptionist job. (Tr. 412). Otis further stated that everyone would believe the white girl because that is the mentality of Cleveland. (Tr. 413). Otis also claimed that it was Maureen who was pumping him for information about dancing and prostitution. (Tr. 413). Additionally, Otis stated that Maureen willingly went into the bedroom with him, took her blouse off, kissed him on his arms, chest, stomach and penis, and forcefully performed oral sex on him. (Tr. 413).

At the conclusion of respondent's trial the jury returned verdicts of guilty as charged as to respondent as well as the Rodgers. Respondent was then sentenced to consecutive terms of incarceration of from seven (7) to twenty-five (25) years on both of the kidnapping counts, and from two (2) to five (5) years on both of the gross sexual imposition counts.

Respondent thereafter perfected a timely appeal as of right to the Ohio Court of Appeals for the Eighth Judicial District. Among her twelve assignments of error, respondent asserted that the absence of her defense counsel from portions of the trial proceedings constituted ineffective assistance of counsel. The Ohio appellate court issued a unanimous opinion affirming respondent's conviction. (A-68). Regarding respondent's ineffective assistance of counsel claim the court noted that the record specifically contradicted or offered no support to respondent's contentions that her counsel was absent at the time of Ms. Steadman's testimony, at the time the exhibits

were introduced, when the motion to suppress was renewed, during the prosecutor's closing argument and at the time of a jury question during deliberations.

Respondent then sought review before the Supreme Court of Ohio. The court, however, declined to exercise its discretionary review authority.

Respondent next filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio. Therein respondent raised six grounds for relief including the claim that defense counsel was "absent from a hearing on a motion to suppress evidence, examination of state's witness, argument to the jury and instruction to the jury." On January 24, 1985, the magistrate issued a report and recommendation in which he recommended that respondent's habeas corpus petition be dismissed and denied in its entirety. (A-30).

In said report, the magistrate rejected respondent's assertions that defense counsel was absent for extensive periods of the trial and held:

> Petitioner in the instant case contends that "counsel was absent from a hearing on a motion to suppress evidence, examination of state's witnesses, argument to the jury and instruction to the jury." *Green v. Arn,* Case No. C84-3026, Application for Habeas Corpus Writ at 5. Examination of the record indicates that petitioner's counsel was absent for the pretrial motion to suppress (TR. 4) and for part of the first day of trial which included a portion of the cross-examination of Maureen McNea, one of the alleged victims (TR. 298). The record gives no indication of any other absences. The record indicates that Mr. Carlin was absent due to his involvement in another criminal case (TR. 4). (A-42).

Furthermore, with respect to the absences reflected by the record, the magistrate held:

> As stated above, the record indicates that Mr. Carlin was absent for the pretrial motion to suppress, and for a portion of the cross-examination of Maureen McNea. The record clearly establishes that the petitioner gave her consent to Mr. Shaughnessy, her co-defendants' counsel, to represent her at the suppression hearing. (TR 4). In addition, Mr. Carlin joined in the motion to suppress the following day. (TR 131). Regarding Miss McNea's testimony, Mr. Carlin had foreseen the possibility that he would be absent, and discussed it with the trial judge beforehand. (TR 299). At that time, both the judge and Mr. Carlin agreed that Mr. Shaughnessy's cross-examination would be sufficient. Even still, Mr. Carlin was given the opportunity to question Miss McNea the following day, and declined to do so. (TR 308). He explained that he had discussed the witness' testimony with his client and Mr. Shaughnessy, and both agreed that it would be best not to question Miss McNea further. (TR 404). The record given indicates that petitioner may have been involved in the decision. (TR 404). (A-43).

The magistrate then applied the ineffective assistance of counsel standards of *Strickland v. Washington,* 466 U.S. 668 (l984), to the facts at bar and concluded that:

> First in examining the record and the rulings by the trial judge, it is not at all clear that the performance by the petitioner's counsel at trial was deficient. Second, even if there was a deficiency, petitioner has failed to show how Mr. Carlin's absence resulted in actual prejudice to her case. After carefully examining the record, this Magistrate finds the petitioner's claim of ineffective assistance of counsel to be without merit. (A-45).

Thereafter the district court rejected the magistrate's recommendation and held that as a matter of law, Mr. Carlin's

absence constituted a Sixth Amendment violation.[2] *Green v. Arn*, 615 F.Supp. 1231 (D.C. Ohio 1985). (A-20). As reflected by the following, the district court's decision was based in large part on the court's mistaken belief that Mr. Carlin had absented himself from an entire afternoon session of respondent's trial:

> After the ninety minute lunch recess, Mr. Shaughnessy resumed his cross-examination of Miss McNea. At this point in the proceedings, the record reflects that Green's counsel, Mr. Carlin, was no longer in the courtroom and had not returned after the lunch recess for any of the afternoon session. (A-21).
>
> * * *
>
> The petitioner was *not* represented by counsel during the one afternoon session of the trial because counsel had left the courtroom to appear in another court. (A-27).

Unfortunately, the district court's belief that respondent's counsel was absent for an entire afternoon session of trial was based on an erroneous reading of the record. In fact, it is undisputed that the June 2, 1983 afternoon session commenced at 2:00 p.m., concluded at 3:40 p.m., and encompassed (73) seventy-three pages of transcript. Contrary to the district court's findings, the record reflects that Mr. Carlin was present for at least half of the afternoon session. Furthermore, the transcript does not indicate the point in time at which Mr. Carlin left the trial proceedings. Thus, based on the record, it is just as reasonable to infer that Mr. Carlin's absence was momentary (e.g. approximating that of a quick use of the court's restroom facilities), as to infer that the absence was one of even the slightest significance.[3]

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[2]In all other respects, the district court adopted the magistrate's report and recommendation.

[3]As cogently observed by Judge Boggs, both parties had to go outside the record to assert the total length of Mr. Carlin's absence. Specifically whereas respondent claims that defense counsel was gone for almost two hours

An appeal was thereafter perfected to the United States Court of Appeals for the Sixth Circuit. Subsequent to briefing and argument, the circuit court issued a 2-1 decision affirming the district court judgment. *Green v. Arn,* 809 F.2d 1257 (6th Cir. 1987). The majority acknowledged that the district court's characterization of Mr. Carlin's absence was clearly erroneous but nevertheless inexplicably contended that the silent record "unequivocally" demonstrated that Mr. Carlin's absence was not de minimis. The majority then held that:

> Where the Sixth Amendment claim is denial rather than the ineffective assistance of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a matter of law, and prejudice is presumed. (A-14).

Thus the majority concluded that neither a *Strickland* nor harmless error analysis was appropriate.

In dissent Judge Boggs correctly recognized the fallacy of the majority reasoning:

> The court's *per se* rule, rather, takes its force from dicta in *Cronic,* which notes that some errors concerning sixth amendment rights may never be harmless, such as a "complete denial of counsel." 466 U.S. 648, 659 (1984). However, the complete denial mentioned there clearly refers to a denial complete in

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Note 3 continued - of the trial, it is petitioner's position, based on conversations with Mr. Carlin, that counsel's absence from the trial proceedings was approximately five minutes. Of course, absent state court findings on this matter, only an evidentiary hearing could adjudge the true period of time that Mr. Carlin was absent from the courtroom. Clearly however, the district court's findings are utterly refutted by the record.

terms of the process of truth-seeking. In fact, the quoted language closely follows the observation that the right to counsel

> is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the sixth amendment guarantee is generally not implicated.

Id. at 658.

Obviously, the absence of the particular retained counsel is "complete" every moment it is continued. Given the episodic nature of the absence, and the reason that counsel's active participation was not required, the actions of retained counsel here are not "a complete denial of counsel" in the sense used in *Cronic.* (A-17).

Judge Boggs went on the emphasize that in *Rose v. Clark,* ___ U.S. ___, 106 S.Ct. 3101 (1986) and *Deleware v. Van Arsdall,* ___ U.S. ___, 106 S.Ct. 1431 (1986), this Court has recently reversed the holdings of a number of circuits regarding a per se finding of constitutional error in lieu of a traditional harmless error analysis.

Similarly, in the case at bar, Judge Boggs demonstated the fundamental injustice of the majority's blanket *per se* rule by stating:

> This problem will be exacerbated by the difficulty of habeas and appellate courts, reviewing a cold record, in determining the presence or absence of counsel at all times. Again, this difficulty is well-illustrated by this case. On the one hand, some of the factual findings made by the district judge below are simply wrong. As this court notes, counsel was not absent for the entire afternoon session. At the same time, his presence is evidenced only by three requests, randomly spaced

> during the middle of the afternoon, for the witness to speak louder. Both parties had to go outside the record to assert the total length of counsel's absence: five minutes by the government's account, nearly two hours by the defendants'. It stretches the bounds of credulity of this judge to think that this type of issue can be handled appropriately by a blanket rule requiring reversal. (A-18).

The State of Ohio now petitions this Court to review the judgment of the court below and, in that process, resolve the conflict among the federal circuit courts, and address the tension between *Coleman v. Alabama,* 399 U.S. 1 (1970) and dicta from *United States v. Cronic,* 466 U.S. 648 (1984).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The instant case presents a substantial issue of national importance regarding the Assistance of Counsel Clause of the Sixth Amendment. The question is whether a harmless error analysis is appropriate where a criminal defendant demonstrates that she was unrepresented by counsel for an indeterminate period of time during a critical stage of the trial.

This question has divided the federal circuit courts. Whereas in the case at bar, the majority applied a per se rule to determine constitutional error, in *Siverson v. O'Leary,* 764 F.2d 1208 (7th Cir. 1985), the Seventh Circuit Court of Appeals adjudicated a claim of ineffective assistance resulting from counsel's absence at a critical stage of the trial by means of a harmless error analysis. In *Siverson,* defense counsel left his client's trial in order to witness a baseball game, and thus was not present to demand the polling of a jury consisting of two jurors who were crying and one who was shaking her head. Applying a reasoning comparable to the Sixth Circuit, the Siverson district court granted Siverson's habeas corpus petition. The Seventh Circuit reversed however, holding that:

> A defendant need not affirmatively prove prejudice under the second prong of the *Strickland* test in order to establish a Sixth Amendment violation based on the lack of defense counsel's assistance at a critical stage of the criminal proceedings.... Instead [the] proper standard for determining the prejudice resulting from the erroneous absence of Siverson's counsel during jury deliberations and the return of the verdict is the same standard that was applied to similar errors prior to *Strickland:* whether the error was harmless beyond a reasonable doubt under *Chapman v. California,* 386 U.S. 18 (1967).

Siverson at 217. The Seventh Circuit thus ordered the district court to dismiss Siverson's habeas corpus petition for the

reason that counsel's absence during both the jury deliberations and the return of verdicts was harmless beyond a reasonable doubt.

Siverson is in full accord with this Court's decision in *Coleman v. Alabama*, 399 U.S. 1 (1970). In *Coleman*, it was agreed that the habeas corpus petitioner had been denied counsel at his preliminary hearing, an undisputed critical step in the prosecution of a criminal defendant. Nevertheless, despite the total absence of representation at this critical stage of the trial, this Court held:

> On the record it cannot be said whether or not petitioners were otherwise prejudiced by the absence of counsel at the preliminary hearing. That inquiry in the first instance should more properly be made by the Alabama courts. The test to be applied is whether the denial of counsel at the preliminary hearing was harmless error under *Chapman v. California*, 386 U.S. 18 (1967).

Id. at 10-11. *Coleman* was thus remanded to the state courts for a determination of whether the defendant was prejudiced by the absence of counsel at his preliminary hearing.

The propriety of a harmless error analysis in *Coleman*, as well as the case at bar, is clear. In *Chapman v. California*, 386 U.S. 18 (1967), this Court rejected the argument that all errors of a constitutional dimension require the reversal of criminal convictions. The principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole, that the constitutional error was harmless beyond a reasonable doubt has subsequently been repeatedly reaffirmed by this Court, *see e.g., Delaware v. Van Arsdall* ___ U.S. ___, 106 S.Ct. 1431 (1986); *Rushen v. Spain*, 464 U.S. 114, 118 (1983); *United States v. Hasting*, 461 U.S. 499, 508-509 (1983); *Moore v. Illinois*, 434 U.S. 220, 232 (1977). Simply put,

> if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

Rose v. Clark, supra, at 3106-3107.

The majority opinion of the circuit court below, as correctly noted by Judge Boggs in his dissent, distorts *Cronic* dicta as implicitly repudicating the harmless error analysis embraced in *Chapman, Coleman,* and their progeny. Obviously, it is undisputed that "some constitutional errors such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Deleware v. Van Arsdall,* ____ U.S. ____, 106 S.Ct. 1431, 1437 (l986). In the case at bar, however, the record reflects a defense counsel absence of mere minutes in a week long multi-defendant trial. Certainly such a momentary absence cannot be equated to the total absence of counsel which *Cronic* or *Gideon v. Wainwright,* 372 U.S. 335 (1963), characterize as warranting a per se finding of constitutional error. A harmless error analysis is therefore clearly the appropriate means by which to determine whether respondent's constitutional rights were violated.

Moreover there is little doubt that an application of a harmless error analysis would result in the affirmance of respondent's conviction. Firstly, as evidenced by the above Statement of the Case, the evidence against respondent and her co-defendants was nothing short of overwhelming. At trial,, Vicki

Steadman and Maureen McNea, the two unrelated victims of respondent's acts of sexual perversion, provided the jury with an explicit account of the tortures to which they were subjected. In response, respondent and the Rodgers through cross-examination and in defense, averred a consistent but simply unbelievable tale of innocence. The subsequent decision of the jury to reject respondent's and the Rodgers' claim that on September 22, 1982, two unrelated strangers both engaged in sexual relations with them, and thereafter coincidently both inverted stories of rape and sexual molestation can hardly been seen as anything but inevitable. Indeed, the ultimate convictions of the Rodgers stands as irrebutable proof that Mr. Carlin's absence had no effect on the jury's verdict concerning respondent's guilt.

Furthermore, it cannot be denied that victim Maureen McNea was subjected to a grueling six hour cross-examination which fully challenged all aspects of Ms. McNea's testimony and character. Certainly it is inconceivable that further cross-examination by Mr. Carlin would have been anything but duplicious of the outstanding, albeit unsuccessful, job of questioning done by Mr. Shaughnessy.

Finally, it is clear from the following record excerpt that Mr. Carlin could have cross-examined Ms. McNea, but declined to do so after a review of Mr. Shaughnessy's cross-examination:

> Mr. Shaughnessy and I discussed the testimony and the statements made by the first witness and it was our, including Pam Green, it was our understanding that it would be in the best interests of our case not to ask her any further questions at all, so, therefore, I told Mr. Brian Fallon, even though he had her here for cross-examination, I told him that I would not be asking her any questions.
>
> That's basically it, Judge. I don't know what else I can say.

(Tr. 403-405). In consideration of the exceptional cross-examination that had previously transpired, Mr. Carlin's tactical decision hardly bespeaks of ineffective assistance.

A petition for writ of certiorari should therefore be granted in order to review the lower court judgment, resolve the conflict in the federal circuits, and clarify whether the harmless error analysis embraced by this Court in *Chapman v. California* and *Coleman v. Alabama* remains good law in light of *Cronic's* dicta.

Respectfully submitted,

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NOS. 85-3745; 85-3796

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA D. GREEN,	)	
Petitioner-Appellee,	)	
Cross-Appellant,	)	ON APPEAL from the United
	)	States District Court for the
v.	)	Northern District of Ohio.
	)	
DOROTHY J. ARN,	)	
Respondent-Appellant,	)	
Cross-Appellee.	)	

Decided and Filed January 27, 1987

Before: JONES, MILBURN and BOGGS, Circuit Judges.

MILBURN, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. BOGGS, Circuit Judge, (pp. 16-19) delivered a separate dissenting opinion.

MILBURN, Circuit Judge. Dorothy Arn, Superintendent (hereinafter "the State"), appeals the decision of the district court granting petitioner Pamela Green's application for a writ of habeas corpus under 28 U.S.C. § 2254. The district court held that petitioner's convictions on two counts of kidnapping in violation of Ohio Rev. Code § 2905.01 and on three counts of gross sexual imposition in violation of Ohio Rev. Code § 2907.05 were obtained in violation of petitioner's Sixth Amendment right to counsel. In anticipation that we might reverse, petitioner cross-appeals the district court's rejection of her other asserted grounds for habeas relief.

The major issue we are asked to decide is whether harmless error analysis is appropriate where a petitioner demonstrates she was unrepresented by counsel for a critical period of time during the taking of evidence against her at trial. For the reasons set forth below, we answer this question in the negative and affirm the district court.

I.

The underlying facts, as set forth by the Ohio Court of Appeals, are as follows:

> On September 22, 1982, two persons independently responded to the following advertisement in the classified section of the newspaper: "Receptionist, over 18, for body shop, no typing, will train, 721-4418." After doing so, a similar chain of events occurred with both individuals.
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> Vicki Steadman answered the ad by phone about 10:00 a.m. and spoke with appellant Pamela Green. Pamela drove to Lyndhurst to pick up Vicki to take her to the interview. When they arrived at 9418 Buckeye Road, Pamela introduced Vicki to Jovan, appellant Wendy Rodgers' four-year-old son, and then later told Jovan to stay in his bedroom. Pamela introduced Vicki to appellant Otis Rodgers.
>
> Otis interviewed Vicki, and then Otis, Pamela and Vicki smoked some marijuana. After meeting Wendy Rodgers, Otis began kissing Vicki after Wendy returned to her bedroom, but Vicki pushed him away. He then took Vicki by the hand into Jovan's bedroom and told Jovan to leave. Otis pulled Vicki onto the bed, pulled her sweater off, unhooked her bra and fondled her. Vicki was afraid and told Otis she had her menstrual period. Otis then laid her on the bed, put his knee on her arms, and ejaculated on Vicki's bare chest.

For her own safety, Vicki told Otis she would think about the job and let him know the next day whether she wanted it. She tried calling her boyfriend for a ride home, but there was no answer. Otis then drove Vicki home.

Later that day at around 2:00 p.m., Maureen McNea responded to the newspaper ad. She was told that the receptionist job had been filled, but that a babysitting job was available. Pamela drove to Maureen's house in Fairview Park to pick up Maureen to take her to the job interview. When they arrived at 9418 Buckeye Road, Pamela introduced Maureen to Jovan. Later, Maureen met Wendy.

After some brief conversation with Wendy, Maureen met Otis. When Otis left the room, Maureen asked to be taken home. Pamela said they would have to wait for the car which allegedly was being repaired. Maureen tried to phone a friend for a ride home, but the line was busy each time she tried.

While the appellants were in the bathroom engaged in bathtub sex, the phone was ringing. Appellants asked Maureen to answer the phone and record the name and nature of the person phoning if in response to the newspaper ad. Maureen took several messages.

When the appellants came out of the bathroom, Maureen again asked to use the phone to try to find a ride home. Otis grabbed the phone, put his legs over it, and started laughing. Pamela said she would take Maureen home after she finished curling Otis's hair, but she did not.

Instead, Otis talked to Maureen about becoming a call girl. Maureen was unresponsive, and Otis became aggravated. Wendy and Otis then took Maureen by her arms and threw her into the bedroom. They said it was time for her initiation. Otis attempted to talk Maureen

into having sex with him. He showed her nude photographs, and he pulled her close to him and touched her. Maureen tried to leave the bedroom at that point, but she could not open the bedroom door.

Otis said he was sick of Maureen's excuses. He called Wendy into the bedroom to show Maureen what would happen to her if she did not acquiesce in his demands. Wendy took a gun out of her purse, told Maureen she would be shot, laughed, and threw the gun to Otis. Otis waived the gun at Maureen and told her there was no way she could get out of having sex with him.

Maureen continued trying to talk her way out. Otis again said he was sick of her excuses. At that point, Pamela and Wendy came into the bedroom, held Maureen down on the bed and began undressing her. Otis undressed and got on top of Maureen at which time Maureen broke away. Otis masturbated and ejaculated on himself. Pamela and Wendy got up and said they had to get to work. Otis asked Maureen if she wanted to go to Dallas with them the next day at noon. Maureen said they could call her and she would let them know. Otis then drove Pamela and Wendy to work and drove Maureen home.

Appellant Wendy Rodgers testified and denied touching Maureen. She stated she was sleeping since she worked in the evenings and did not feel well. She knew that Otis and Maureen were in the other bedroom with the door closed, but she said she trusted Otis. Wendy and Otis had been married two and one-half years, Wendy also testified that Pamela and Maureen left to buy cigarettes and returned. She denied the alleged bathtub sex and said that Maureen was offered the job. Wendy did not know whether Otis touched Vicki.

> On cross-examination Wendy testified that it was important to know the race of the persons calling for the job since she and Otis were an interracial couple which would be offensive to some people. She also testified that no traveling was necessary for the baby-sitting job, but it was necessary for the receptionist's job.

Joint Appendix at 44-47.

Following petitioner's jury conviction, the trial court pronounced a sentence of seven to twenty-five years imprisonment on each of the kidnapping counts, and two to five years imprisonment on each of the gross sexual imposition counts, all sentences to run consecutively. Petitioner appealed to the Ohio Court of Appeals, which modified her sentence to an aggregate minimum of fifteen years in compliance with Ohio Rev. Code § 2929.41(E)(2). The court affirmed petitioner's conviction and sentence in all other respects. Petitioner's motion for leave to appeal to the Ohio Supreme Court was denied for want of a substantial constitutional question.

II.

A. Sixth Amendment Claim

Petitioner's Sixth Amendment claim stems from her assertion that her trial counsel was absent from various critical stages of the proceedings. Petitioner was jointly tried along with two other co-defendants who were both represented by Mr. Shaughnessy. Petitioner was represented by retained counsel, Mr. Carlin. In granting the writ, the district court's concern surrounded the absence of Mr. Carlin during the afternoon of the first day of trial, Thursday, June 2, 1983, during which Mr. Shaughnessy cross-examined the state's first witness, victim Maureen McNea. Mr. Carlin was attending a jury sentencing hearing in a capital case in another courtroom on

behalf of a different client.[1]

The magistrate, to whom the case was initially referred, applied the two-pronged test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984), and determined (1) that it is not clear counsel's performance was deficient, and (2) that petitioner failed to show how Mr. Carlin's absence resulted in prejudice.

The district court declined to follow the magistrate's analysis. Relying on *Strickland,* 104 S. Ct. at 2067, and *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 2047, 80 L.Ed. 2d 657, (1984), the district court concluded that prejudice is legally presumed when there has been an actual or constructive denial of the assistance of counsel, as opposed to the ineffective assistance of counsel who is present. The court further reasoned that the absence of counsel during the taking of evidence must be found, as a matter of law, to violate the constitutional right to assistance of counsel.

The State first argues that the district court's characterization of Mr. Carlin's absence on June 2, 1983, is "grossly inaccurate." The district court stated that Mr. Carlin "had not returned after the lunch recess for *any* of the afternoon session." (emphasis supplied). The italicized language is clearly erroneous as the record indicates Mr. Carlin's presence twice during the afternoon session.

However, the state concedes, as it must, that Mr. Carlin was absent for a portion of the afternoon session on June 2, 1983. The record shows the following:

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[1]Petitioner also asserts that Mr. Carlin was absent during a hearing on a motion to suppress evidence, during the prosecutor's closing arguments to the jury, when the jury asked questions during deliberations, and when various exhibits were offered into evidence during trial. In light of our holding *infra,* that Mr. Carlin's absence on the afternoon of June 2, 1983, requires the granting of the writ, we need not discuss these additional claims which raise factual disputes and/or legal issues of waiver.

MR. SHAUGHNESSY: Your Honor, in this matter, it's now twenty minutes to 4:00. Counsel for Otis and Wendy Rodgers, having conducted a somewhat brief cross-examination from 2:00, in any event, it appears that we were, of course, hoping that Mr. John F. Carlin, attorney for Pam Green, would be back in time to resume his cross-examination.

That not being the case, the record should reflect that he was in a chair case, a murder case, I think we have already mentioned, the State of Ohio v. David Mapes, before the Honorable James Patrick Kilbane.

That trial concluded with a verdict of guilty on Friday. The sentencing portion, in which the jury is involved, because it is a chair case, was supposed to have taken, supposed to be a week interval everyone thought.

Now, it didn't work out that way. Mr. Carlin then has been called back, and he has had to absent himself from the courtroom. I don't know what he might ask the Court to do.

THE COURT: I can answer that.

MR. SHAUGHNESSY: But I would ask you if you would do this. At least have the young lady [witness McNea] available. Carlin may want to recall her. I don't know.

THE COURT: Let the record reflect the Court, in anticipation of this problem with Mr. Carlin, discussed it with him prior to the lunch break, and he informed me that he would be content with Mr. Shaughnessy's cross-examination on behalf of all three defendants, so with that assurance, the Court feels that one cross-examination is sufficient.

MR. SHAUGHNESSY: Fine, sir.

Joint Appendix at 441-42.

Thereafter, petitioner addressed the trial judge:

MR. SHAUGHNESSY: ... May the defendant Green address the Court very briefly while the jury is coming in?

THE COURT: Certainly.

DEFENDANT GREEN: I would like to find out if we could have this case continued until I have the benefit of my attorney being here in the courtroom with me while this trial is going on?

MR. SHAUGHNESSY: Can he come back?

THE COURT: Why?

MR. SHAUGHNESSY: Do you know where your attorney is, Miss Green?

DEFENDANT: He is in another trial at this time.

MR. SHAUGHNESSY: Why don't you just hold the girl [witness McNea] here until -

THE COURT: We will go until 4:30. When Mr. Carlin come [sic] back, maybe we can go back into that.

Well, Miss Green, do you feel that by virtue of the fact your attorney, Mr. Carlin, has been in and out the last several days, do you feel that this is not according to the way you want it to go? You prefer to have Mr. Carlin present at all times?

DEFENDANT GREEN: Yes, I do prefer to have him.

THE COURT: Well, then, I suppose she certainly has the right to counsel, Mr. Carlin. Mr. Prosecutor, do you

have any comment?

MR. FALLON: Judge, at this point I don't know what we can do, if she is asking for her attorney to be present, and he is not here, other than that I don't know exactly what's going on up on the twenty-third floor. If maybe we can make a phone call to try to find out what the situation is.

Obviously, my problem is with a witness from out of state. She is here. I have made her available, and I would like to keep her available tomorrow and have her back here.

Joint Appendix at 445-46 (emphasis supplied).

The next morning, the following colloquy occurred:

THE COURT: All right, Mr. Carlin, I understand you want to go on the record.

MR. CARLIN: Yes, Your Honor. I have no questions of the witness, Maureen McNea, and I have been informed by my client, Pamela Green, that she wishes to have me withdraw and find new counsel. I have to inform the Court of that.

THE COURT: All right, Miss Green, the Court will not permit that at this late stage of the trial. This trial must proceed. All right. Call the jury.

Joint Appendix at 447.

Finally, later that afternoon, June 3, 1983, petitioner continued to press the point:

THE COURT: Mr. Carlin, you indicated you wanted to put something on the record. The jury is now out.

MR. CARLIN: May I have a moment, Your Honor? I don't understand this motion that I'm being requested to make on behalf of Pamela Green.

I have been handed a yellow piece of paper saying "Judicial misconduct, defendant's attorney not being present during trial". I would assume that Pamela-

THE COURT: Judicial misconduct?

MR. CARLIN: That's what it says. I'm just reading you what I see.

THE COURT: Continue on.

MR. CARLIN: I assume that because I wasn't present during the entire examination of the first witness, I would assume that that is the reason why she would want a mistrial.

I was under the understanding there was a waiver involved in that, number one, and, number two, Mr. Shaughnessy and I discussed the testimony and the statements made by the first witness and it was our, including Pamela Green, it was our understanding that it would be in the best interests of our case not to ask her any further questions at all, so, therefore, I told Mr. Brian Fallon, even though he had her here for my cross-examination, I told him that I would not be asking her any questions.

That's basically it, Judge. I don't know what else I can say.

THE COURT: The motion for a mistrial is overruled. Further, Miss Pamela Green, your bond is hereby revoked, and you are remanded to the County Facility pending the outcome of this trial.

Joint Appendix at 479-80.

Thus, although Mr. Carlin was present during a portion of the afternoon session of June 2, 1983, it is beyond dispute that he was absent during a critical part of the afternoon. We therefore decline the State's invitation to remand for an evidentiary hearing to determine exactly when Mr. Carlin was absent. Although it may be that some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance, the instant record unequivocally demonstrates that Mr. Carlin's absence was not de minimis. In our view, the record permits but one conclusion: petitioner's constitutional right to counsel was implicated by Mr. Carlin's absence.[2]

We are thus faced with determining the constitutional significance of Mr. Carlin's absence. At the outset, we agree with the district court that the two-pronged *Strickland v. Washington* test is inappropriate where the issue is the denial of the assistance of counsel, rather than a claim that counsel who was present was ineffective. This distinction is referred to in *Strickland v. Washington,* wherein the Supreme Court stated that the "denial of the assistance of counsel altogether is legally presumed to result in prejudice." 104 S. Ct. at 2067. Moreover, in the companion case of *United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed. 2d 657, (1984), the Court instructed that there is a "constitutional error without any showing of prejudice when counsel was ... totally absent ... during a critical stage of the proceeding." *Id.* at 2047 n.25. *See also Siverson v. O'Leary,* 764 F.2d 1208, 1217 (7th Cir. 1985) (a defendant need not affirmatively show prejudice under the second prong of the *Strickland* test in order to establish a Sixth Amendment

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[2]The state has not argued that petitioner waived her right to cousel during the June 2, 1983 afternoon session. Indeed, petitioner's actions, set forth above, would not permit a finding that she voluntarily and knowingly waived her right to counsel. *See Boyd v. Dutton,* 405 U.S. 1, 3, 92 S. Ct. 759, 760 (1972) (per curiam); *Martin v. Rose,* 744 F.2d 1245, 1251 (6th Cir. 1984).

violation based on the lack of defense counsel's assistance at a critical stage of the criminal proceedings); *Golden v. Newsome,* 755 F.2d 1478, 1481 n.6, 1483 (11th Cir. 1985) (absence of counsel is presumptively prejudicial).

This does not dispose of this case, however, because the State argues that it should be allowed the opportunity to show that the constitutional violation was harmless error. The State relies on *Takacs v. Engle,* 768 F.2d 122, 124 (6th Cir. 1985), in which this court relied on *McKeldin v. Rose,* 631 F.2d 458 (6th Cir. 1980) (per curiam), *cert. denied,* 450 U.S. 969 (1981), in holding that a harmless error analysis is appropriate in considering the constitutional effect of the denial of counsel at a preliminary hearing.

However, *Takacs* and *McKeldin* are distinguishable precisely because they dealt with the denial of counsel at preliminary hearings rather than at trial. We noted this distinction in *McKeldin* when we distinguished *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173 (1978), and *People v. Felder,* 47 N.Y.2d 287, 418 N.Y.S.2d 295, 391 N.E.2d 1274 (1979), in which the courts declined to engage in a harmless error inquiry:

> Neither *Holloway* nor *Felder* involved preliminary hearings. Both involved ineffective assistance of counsel at trial. It is established beyond question that denial of effective assistance of counsel at trial may never be treated as harmless error. However, the Supreme Court in *Coleman v. Alabama,* [399 U.S. 1, 90 S. Ct. 1999 (1970)], provided specifically for a determination of whether denial of counsel at a preliminary hearing was harmless error.

McKeldin, 631 F.2d at 460.

In light of *Strickland v. Washington, supra,* we now know the above quotation is not an entirely accurate statement of the law. An individual claiming ineffective assistance of counsel must show that he was prejudiced by his trial counsel's defi-

cient performance. The instant case, however, poses a different question; *viz.*, is a harmless error analysis appropriate to a claim of the denial of counsel at trial? We believe the answer to this question can be discerned from *United States v. Cronic, supra:*

> [B]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs,... the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
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> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.[25] Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974) because the petitioner had been "denied the right of effective cross examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 318, 94 S. Ct. at 1111 (citing *Smith v. Illinois,* 390 U.S. 129, 131, 88 S. Ct. 748, 749, 19 L.Ed.2d 956 (1968), and *Brookhart v. Janis,* 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314 (1965)).[26]

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[25]The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding....

[26]Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of

104 S. Ct. at 2046-47 (citations and footnotes omitted).

Our reading of all these cases leads us to conclude the law is as follows: Where the Sixth Amendment claim is the denial, rather than the ineffective assistance, of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a matter of law, and prejudice is presumed. Nonetheless, a harmless error analysis is appropriate in some instances. *See e.g., Coleman, supra,* 399 U.S. at 10-11, 90 S. Ct. at 2003-04 (preliminary hearing); *Takacs, supra,* 768 F.2d at 124 (preliminary hearing); *McKeldin, supra,* 631 F.2d at 460 (preliminary hearing); and *Siverson, supra,* 764 F.2d at 1217 (jury deliberations and return of the verdict). However, there are some stages of a criminal trial where "the deprivation, by its very nature, cannot be harmless." *Rushen v. Spain,* 104 S. Ct. 453, 455 n.2 (1983) (per curiam) (citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792 (1963)). *See also Siverson, supra,* 764 F.2d at 1217-18 n.6 ("We recognize that the lack of counsel at some critical stages may be considered prejudicial *per se,* and may result in automatic reversal of the defendant's convictions without any opportunity for a harmless error inquiry."). "Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost." *Strickland v. Washington, supra,* 104 S. Ct. at 2067.

We believe that the present case is one where a harmless error inquiry should be foreclosed. It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt. *Cf. Adams v. Illinois,* 405 U.S. 278, 282-83, 92 S. Ct. 916, 919 (1972) (lack of counsel at a preliminary hearing involves less danger to the integrity of the truth-determining process at trial than the omission of counsel at the trial itself). The absence of counsel during the taking of evidence on the

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Note 26 cont. guilt. *See Strickland v. Washington, post,* 466 U.S., at, 687, 104 S. Ct., at 2064 ....

defendant's guilt is prejudicial per se and justified an automatic grant of the writ "without any opportunity for a harmless error inquiry." *Siverson, supra,* 764 F.2d at 1217-18 n.6.

Our holding that petitioner was denied a fair trial is buttressed by the actions of the trial judge. In *Siverson, supra,* the Seventh Circuit noted that in situations where a defendant is without assistance of counsel at a critical stage, "the court can help protect the defendant's rights by at least insuring that the defendant is aware of and understands the right to have counsel present...." 764 F.2d at 1217. In the instant case, the trial judge seemed to believe that he and Mr. Carlin could decide, without consulting petitioner, when Mr. Carlin could absent himself from the proceedings. Thus, in a situation where the impairment of petitioner's Sixth Amendment right was easy to identify and prevent, the government instead acted to further the deprivation. *See Strickland v. Washington, supra,* 104 S. Ct. at 2067. In such circumstances there is little reason to allow the government to attempt to show a lack of prejudice.

III.

For the reasons stated, the decision of the district court is AFFIRMED. In light of this holding, we need not address petitioner's cross-appeal.

BOGGS, Circuit Judge, dissenting.

The court's opinion in this case fashions a new rule concerning the presence of criminal defense counsel at trial. "The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ [of habeas corpus]...." Slip op. at 15. Further, this rule will be applied even where counsel is retained, where counsel for co-defendants was conducting a vigorous and wide-ranging cross-examination during the absence, where there is not even the faintest speculation of

any actual prejudice that may have occurred, and where every opportunity was given the absent counsel to undertake any further actions he wished when he returned. I do not believe this result is either required by precedent or sensible as policy, and I therefore respectfully dissent.

In simplest terms, what happened here was that retained defense counsel "ducked out" of a joint trial for an undetermined amount of time during the cross-examination of a key witness by counsel for co-defendants. This was concurred in by the other counsel and pursuant to the tactic of having only the other counsel cross-examine this witness.

I agree with the court that it was error for the judge to condone counsel's absence, certainly without the defendant's explicit consent. The issue at hand, though, is whether that error could be harmless, just as errors regarding trial instruction, admission of evidence, argumentation, confrontation, and other critical aspects of trial and other important constitutional rights have been held harmless. It is most remarkable that what happened here is barred from such analysis by the court's *per se* rule, though far less fraught with potential for actual prejudice than in many harmless error cases.

Here, there is no indication that counsel's assistance might have been considered ineffective had he simply sat at counsel table like a bump on a log during the afternoon cross-examination. The cross-examination that was conducted was probing and extensive. It was primarily directed to eliciting information exculpatory to all the defendants, and often dealt with matters that could have been exculpatory to Green. Unless we say that all counsel must "show the flag" on all cross-examinations, a trial tactic that may be highly dubious, counsel's only sin here was absence during some portions of the cross-examination. Taken as a whole, counsel's performance during trial cannot be considered to fall short of the standard in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674, (1984), nor can it be said that counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic,* 466 U.S. 648,

659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

The court's *per se* rule, rather, takes its force from dicta in *Cronic,* which notes that some errors concerning sixth amendment rights may never be harmless, such as "complete denial of counsel." 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). However, the complete denial mentioned there clearly refers to a denial complete in terms of the *process* of truth-seeking. In fact, the quoted language closely follows the observation that the right to counsel

> is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the sixth amendment guarantee is generally not implicated.

Id. at 658.

Obviously, the absence of the particular retained counsel is "complete" every moment it is continued. Given the episodic nature of the absence, and the reason that counsel's active participation was not required, the actions of retained counsel here are not "a complete denial of counsel" in the sense used in *Cronic.* The cases cited in *Cronic,* 466 U.S. at 659, 104 S. Ct. at 2047 and those cited in support of *Cronic* in this opinion, all involve instances where something having to do with the truth-seeking process was prevented by court ruling, or where the part to be played in that process by defense counsel was wholly absent.

Here, there is no hint or even speculation that what went into the record or into the ears of the jury would have differed if the error had not occurred. Nor is this an instance where counsel's presence to object or take a strategic decision could have been crucial, nor where an opportunity was irrevocably waived. It elevates form over substance to equate what occurred here to the true denials of counsel cited in *Cronic.*

It is also quite strange that this *per se* rule is adopted very

shortly after the Supreme Court, in *Rose v. Clark,* ___ U.S. ___, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986), and *Delaware v. Van Arsdall,* ___ U.S. ___, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), reversed the holding of a number of circuits, including ours, that removing from the state the burden of proof on the key element of intent could never be harmless error. In any general weighing of the damage to a defendant or the damage to the truth-seeking process, the events here must rank far lower than the presumption which *Rose* held could be analyzed by traditional harmless error standards.

I reiterate that I do not condone the actions of counsel or court in this case. There are excellent reasons that presence of counsel at all times can be a vital protection for an accused. But so can be all the constitutional rights whose violations are frequently characterized as harmless. The facts of this case are a long way from, for an extreme example, taking of direct testimony against a single defendant whose counsel is absent.

Thus, I find no justification for a blanket rule of this type, and I think the facts of this case show why. If a reversal is mandated whenever counsel (even retained) is absent from the courtroom for any significant period, we make such an escape a sure ticket to a new trial. In multi-defendant cases, judges will be required to keep a continued head count, as in *Stalag 17,* lest cagey counsel be able to invoke this new rule.

This problem will be exacerbated by the difficulty of habeas and appellate courts, reviewing a cold record, in determining the presence or absence of counsel at all times. Again, this difficulty is well-illustrated by this case. On the one hand, some of the factual findings made by the district judge below are simply wrong. As this court notes, counsel was not absent for the entire afternoon session. At the same time, his presence is evidenced only by three requests, randomly spaced during the middle of the afternoon, for the witness to speak louder. Both parties had to go outside the record to assert the total length of counsel's absence: five minutes by the government's account, nearly two hours by the defendants'. It

stretches the bounds of credulity of this judge to think that this type of issue can be handled appropriately by a blanket rule requiring reversal.

For all of the foregoing reasons, I dissent from the grant of the writ of habeas corpus on the current record.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PAMELA D. GREEN,
Plaintiff,

v.

DOROTHY J. ARN, SUPT.,
Defendant.

No. C84-3026

OPINION AND ORDER
Filed August 16, 1985
[File stamp deleted]

BELL, J.:

Presently before the court is Pamela Green's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254. Green challenges her convictions of two counts of kidnapping and three counts of gross sexual imposition. On January 24, 1985, Magistrate Laurie filed his report and recommended that the petition be denied. Thereafter, on January 31, 1985, the petitioner timely filed her objections to the magistrate's report.

The petitioner raised six separate grounds in the petition for the writ; however, only that relating to petitioner's right to counsel under the sixth amendment was noted in the objections filed on January 31, 1985. In this regard, the court has reviewed the other five grounds in the petition and finds that the record does not support the granting of the writ of habeas corpus on any of those grounds. In addition, the court has reviewed the magistrate's report and recommended decision and finds that the report fully addresses each of them. Thus, the court's inquiry shall be directed to the petitioner's right to counsel claims under the sixth amendment.

The record in this action reveals an unusual series of facts concerning the conduct of Green's counsel, Mr. Carlin, during the course of trial. Green was a co-defendant at trial with two other defendants who were represented by separate counsel, Mr. Shaughnessy.

On the morning of June 2, 1983, the petitioner's trial to a jury commenced and opening statements were given by the prosecutor and both defense attorneys. Immediately thereafter the state called, as its first witness, one Maureen McNea, who was alleged to have been a victim of the defendant's criminal acts. This witness testified on direct examination that Green was an active participant in her kidnapping and the sexual imposition visited upon her. At the conclusion of the state's examination, Mr. Shaughnessy commenced his cross-examination of the witness; this questioning continued for approximately forty-five minutes until the lunch recess.

After the ninety minute lunch recess, Mr. Shaughnessy resumed his cross-examination of Miss McNea. At this point in the proceedings, the record reflects that Green's counsel, Mr. Carlin, was no longer in the courtroom and had not returned after the lunch recess for any of the afternoon session. Instead, Mr. Carlin was attending a scheduled hearing in another courtroom on behalf of a different client. The trial court did not discuss Carlin's absence with the petitioner nor was Carlin's absence discussed or explained in the presence of the jury. After approximately two hours of additional cross-examination by Mr. Shaughnessy, and a short re-direct by the prosecutor, the witness was dismissed and a short afternoon recess was given to the jury.

During the recess and outside of the presence of the jury, Mr. Shaughnessy requested that the court detain the witness until Mr. Carlin could be present and able to cross-examine. The trial judge responded to the request as follows:

> THE COURT: Let the record reflect the Court, in anticipation of this problem with Mr. Carlin, discussed it with him prior to the lunch break, and he informed me that

> he would be content with Mr. Shaughnessy's cross-examination on behalf of all three defendants, so with that assurance, the Court feels that one cross-examination is sufficient.

(Trial Transcript at 299.) Thereafter, the trial judge informed the prosecutor that the witness would not have to be available for any further proceeding connected with the trial.

At this point in the proceedings, the defendant requested, and was permitted, the opportunity to address the court; the following dialogue occurred:

> DEFENDANT GREEN: I would like to find out if we could have this case continued until I have the benefit of my attorney being here in the courtroom with me while this trial is going on?
>
> MR. SHAUGHNESSY: Can he come back?
>
> THE COURT: Why?
>
> MR. SHAUGHNESSY: Do you know where your attorney is, Miss Green?
>
> DEFENDANT: He is in another trial at this time.
>
> MR. SHAUGHNESSY: Why don't you just hold the girl here until --
>
> THE COURT: We will go until 4:30. When Mr. Carlin come [sic] back, maybe we can go back into that.
>
> Well, Miss Green, do you feel that by virtue of the fact your attorney, Mr. Carlin, has been in and out the last several days, do you feel that this is not according to the way you want it to go? You prefer to have Mr. Carlin present at all times?

DEFENDANT GREEN: Yes, I do prefer to have him.

THE COURT: Well, then, I suppose she certainly has the right to counsel, Mr. Carlin.

(Trial Transcript at 305-306). At no time during the above dialogue was Mr. Carlin present in the courtroom. After further discussions in the judge's chambers which are not on the record, an adjournment was taken until the next day.

The next morning, June 3, 1983, Green's counsel was present for the proceedings and the following statements were placed on the record prior to the taking of any further testimony.

THE COURT: All right, Mr. Carlin, I understand you want to go on the record.

MR CARLIN: Yes, Your Honor. I have no questions of the witness, Maureen McNea. and I have been informed by my client, Pamela Green, that she wishes to have me withdraw and find new counsel. I have to inform the Court of that.

THE COURT: All right. Miss Green, the Court will not permit that at this stage of the trial. This trial must proceed. All right. Call the jury.

(Trial Transcript at 308.)

Later that morning the defendant wrote her attorney a note and had counsel move for a mistrial on the stated grounds that her attorney was "not being present during trial." (TR. 403). This motion was denied by the trial court and the judge *sua sponte* and without any explanation in the record immediately revoked her bond. (TR 404).

The basic issue before this court is whether the absence of Green's counsel during the examination of a witness by counsel for the co-defendants constitutes a violation of her sixth

amendment right to counsel. The sixth amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The assistance of counsel language in this amendment has been construed by the courts to provide the accused in a criminal action with various fundamental rights. These rights include the right to have counsel appointed if the defendant is financially unable to afford counsel, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); and the right of self-representation if the accused elects to forego the assistance of counsel. *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1974). In addition, the defendant is entitled to have the effective assistance of counsel, *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Martin v. Rose,* 744 F.2d 1245 (6th Cir. 1984); and the right to retain and consult with counsel of her choice, *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *United States v. Reese,* 699 F.2d 803 (6th Cir. 1983); *Linton v. Perini,* 656 F.2d 207 (6th Cir. 1981), *cert. denied* 454 U.S. 1162 (1982). This action requires an examination of the petitioner's right to consult with counsel of her choice and whether counsel was ineffective.

Recently the Supreme Court rendered two decisions which are relevant to the petition before this court. In *Strickland v. Washington, supra,* the petitioner claimed that his counsel was ineffective at trial since he failed to present character witnesses on behalf of the accused and failed to obtain various psychiatric reports. There were no claims at the trial

proceedings that defense counsel was incompetent nor was any request made by the accused or on his behalf to have the action continued.

The *Strickland* Court rejected the petitioner's claims and defined a two-pronged test to be applied when reviewing most claims of ineffective assistance of counsel in a habeas corpus petition. Under the *Strickland* test a petitioner must first demonstrate that counsel's performance failed to meet a minimum objective standard of reasonableness, and second the petitioner must demonstrate that the deficient performance of counsel resulted in prejudice to the defense. 104 S.Ct. at 2065, 90 L.Ed.2d at 695. This prejudice to the accused is determined by assessing the entire record to see "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 104 S.Ct. at 2069, 80 L.Ed.2d at 698.

The application of the two-pronged test set forth above does not automatically apply to all cases involving the right to counsel or the effective assistance of counsel. As acknowledged in *Strickland,* the prejudice to the accused is legally presumed to result when there has been an "actual or constructive denial of the assistance of counsel." 104 S.Ct. at 1066, 80 L.Ed.2d at 696.

In *United States v. Cronic,* 466 U.S. 468, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), decided on the same date as *Strickland,* the Court identified some of the circumstances that present violations of the accused right to counsel as a matter of law without any showing of actual prejudice. The Court stated:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself is pre-

> sumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska,* 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974) because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 318, 39 L.Ed.2d 347, 94 S.Ct. 105 (citing *Smith v. Illinois,* 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), and *Brookhart v. Janis,* 384 U.S. 1,3, 16 L.Ed.2d 314, 86 S.Ct. 1245 (1966).
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. (Footnote omitted.)

United States v. Cronic, supra at, 104 S.Ct. at 2047, 80 L.Ed.2d at 668.

It is clear from the above decisions that a petitioner asserting a claim of ineffective assistance of counsel must demonstrate either that he was denied counsel at a critical stage of the proceedings or establish the requirements set forth in *Strickland.* However, once the record reveals that the accused was denied counsel at a critical stage of the proceedings, this court must find, as a matter of law, that a constitutional error was committed. See *United States v. Cronic, supra* 104 S.Ct. 2047 at n.25.

In this action the magistrate applied the two-pronged test enunciated in *Strickland* in his report to this court. The magistrate found that a review of the entire record demonstrated that the petitioner did not show how counsel's absences resulted in any actual prejudice. In essence, the magistrate found that the evidence in the record clearly demonstrated the guilt of the

accused and that she would have been so found by the jury regardless of the attendance practice of her counsel. This court, however, must disagree with the application of the *Strickland* test in this action. Instead, the record must first be reviewed to determine whether the petitioner was denied her right to counsel during a critical stage in the proceedings.

In this action, the petitioner had access to her retained counsel during most of the trial proceedings unlike those cases in which the accused was tried without any representation whatsoever. However, the petitioner was *not* represented by counsel during the one afternoon session of the trial because counsel had left the courtroom to appear in another court. This absence of counsel during the taking of evidence at her trial must be found, as a matter of law, to violate the petitioner's fundamental constitutional right to assistance of counsel. Thus, the petitioner does not have to demonstrate any actual prejudice as defined in the two-pronged test in *Strickland v. Washington, supra.*

As the trial itself constitutes a critical stage of the total proceedings in which defendant was involved, the presentation of the testimony of an alleged victim of defendant's criminal activity constitutes a critical stage of the trial. At the risk of stating a fact too obvious to mention, one of the duties of trial counsel is to be with and afford representation to his client during the course of the trial. The simplest form of representation and the very least to which the client is entitled is the physical presence of counsel in the courtroom while testimony is being given. It is axionmatic that the trial not proceed absent the presence of the attorney for the defendant, *Geders v. United States, supra* at 88; *Javor v. United States,* 724 F.2d 831, 834 (9th Cir. 1984); or absent some effective waiver of his presence by the client *Martin v. Rose, supra* at 1251; *United States v. Reese, supra* at 805.

But, the question posed by counsel's voluntary absenteeism from the courtroom in this instance because he was actively representing another defendant in another courtroom is but half the question raised by petitioner in this cause. What of the

responsibility of the trial judge, who with knowledge of counsel's absence, allows the trial to continue. Surely it cannot be said that defendant was in control of the trial proceedings; the trial judge was. Neither can it be argued that the deprivation claimed by petitioner because of her lack of representation was one which was self-invited. The facts here illustrate clearly that the trial judge knew Ms. Green's attorney would not be present and why. With such knowledge, he did not advise petitioner that counsel would not be in court; did not ask for or discuss her waiver of counsel's presence and did allow the state's witness to leave after her testimony was completed even though she had not been subject to Ms. Green's cross-examination. It could not be said that the error discussed can be categorized in any manner as being harmless in nature. It can be said that the continuation of the trial proceedings in the manner briefly described above constitute a deprivation of petitioner's rights and the deprivation is of constitutional proportion. Rulings by a trial court which prevent defense counsel from assisting a defendant during a critical stage of the proceedings are not subject to review under a harmless error standard. *See, United States v. Cronic, supra* at, 104 S.Ct. at 2047, 80 L.Ed.2d at 668; *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Geders v. United States, supra; Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *Siverson v. O'Leary,* 764 F.2d 1208 (7th Cir. 1985); *Wilson v. Mintzes,* 761 F.2d 275 (6th Cir. 1985).

The absence of counsel for a period of more than two hours under the circumstances referred to above constitutes, in my opinion, ineffectiveness of counsel per se. Under these circumstances it is not necessary to prove that defendant was prejudiced; it is enough to prove the fact, to which the prejudice attached. Logic guides us to the thought that if we were to suggest otherwise, the absence of counsel for a day or three days would not constitute ineffectiveness of counsel unless it were somehow shown that defendant had been actually prejudiced by the absence.

The right of the accused to have access to counsel at all

critical stages of the proceedings includes the right to have counsel present during the presentation of all of the evidence at the trial proceedings. Each part of the trial must be deemed to be a critical stage of the proceedings and mandates that the accused have access to her counsel. In this action the trial judge clearly had a responsibility to protect the constitutional rights of the accused.

The judge was informed of the petitioner's counsel's scheduling problem prior to recessing that morning and chose to proceed with the prosecution of the action without counsel. This decision to proceed without defense counsel was done without the expressed consent or waiver of the defendant. Thus, a constitutional error was committed which violated the rights of the accused. Accordingly, the writ of habeas corpus shall issue and the petitioner shall be released unless within ninety days of this order the State of Ohio begins new trial proceedings against her.

IT IS SO ORDERED.

/s/ Sam H. Bell
Sam H. Bell
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PAMELA D. GREEN, *Petitioner,*	)	Civil Action No. C84-3026 Judge Sam H. Bell
v.	)	Report and Recommendation of Magistrate
DOROTHY J. ARN, SUPT., *Respondent.*	)	Magistrate Charles R. Laurie

On September 24, 1984, the Petitioner, Pamela D. Green, filed a motion seeking leave to proceed *in forma pauperis* and requesting the appointment of counsel. The Petitioner's request were granted by United States District Judge Sam H. Bell on September 28, 1984. The Petitioner initiated this action for habeas corpus relief pursuant to Title 28, United States Code, section 2254, on September 28, 1984. On October 1, 1984, Judge Bell ordered the Respondent to file a return of writ within twenty (20) days. On that same date Judge Bell referred the case to this Magistrate for supervision and for the preparation of a written report containing a recommended disposition of the case. On October 2, 1984, this Magistrate ordered the Petitioner to submit a brief or memorandum in support of her application for habeas corpus on or before October 29, 1984. On October 17, 1984, the Petitioner timely filed her brief in support.[1]/ On October 24, 1984, the Respondent requested an

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[1]/ This Magistrate notes that the substantive portion of this brief contained in pages three (3) through twenty-seven (27) is substantially identical, word-for-word, to pages five (5) through thirty-two (32) of Petitioner's memorandum in support of jurisdiction submitted to the Ohio Supreme Court on July 3, 1984 in *State v. Green,* Case No. 84-1082. The only changes noted are: (1) deletion of the word "defendant" and the insertion in its place of the word "petitioner" throughout the brief; (2) the addition of one paragraph of new, but irrelevant, material on state law on page ten (10); and (3) the completion of citations on pages eleven (11) and twelve (12) by filling in absent page numbers in cited cases. This rehash of arguments presented to the state

extension of time in which to file a return of writ, stating that certain documents essential to the preparation of a return had not yet been received from the state courts. An enlargement of time until November 9, 1984 was granted on October 26, 1984 by this Magistrate. The Respondent filed a return of writ on November 7, 1984. On November 9, 1984, the Petitioner filed a traverse and brief.

HISTORY OF PROCEEDINGS

During the September 1982 Term, the Cuyahoga County Grand Jury indicted the Petitioner on two (2) counts of kidnapping in violation of section 2905.02 of the Ohio Revised Code, and on three (3) counts of gross sexual imposition in violation of section 2907.05 of the Ohio Revised Code. The Petitioner entered a plea of not guilty and was tried before a jury on June 2, 3 and 6, 1983. The jury returned a verdict of guilty on all five (5) counts as charged in the indictment. The trial court sentenced the Petitioner to an indeterminate term of imprisonment of from seven (7) to twenty-five (25) years on each of the two (2) kidnapping counts and to an indeterminate term of imprisonment of from two (2) to five (5) years on each of the three (3) gross sexual imposition counts, with all terms of imprisonment

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Note 1/ cont. courts is not the type of brief contemplated by the order issued by this Magistrate on October 2, 1984, wherein the Petitioner was ordered to set forth with particularity the federal constitutional, statutory, and case authority relied upon, and to state with specificity (with citation to applicable portions of the transcript) the facts supporting Petitioner's grounds for relief. The brief submitted does nothing to clarify or support the grounds for relief advanced by Petitioner in her application for habeas corpus relief. It is apparent that Petitioner's counsel's time spent preparing this brief was minimal. Consequently, this Magistrate recommends that this factor be taken into consideration when reviewing any requested attorney fees. *See Roundtree v. Perini,* Case No. C83-4820, Supplement to Report and Recommendation of Magistrate (N.D. Ohio, July 30, 1984); *Tatonetti v. Gray,* Case No. 83-2363, Report and Recommendation of Magistrate at 19 n. 2 (N.D. Ohio, October 7, 1983).

to run consecutively to each other. *State v. Green*, Case No. CR-176974 (Cuyahoga County Court of Common Pleas, 1983).

The Petitioner perfected an appeal to the Ohio Court of Appeals for Cuyahoga County, Eighth Judicial District raising the following thirteen (13) assignments of error:

1. The court committed prejudicial error in overruling the motion of the defendant to suppress evidence.

   A) The state waived its right to object on the basis of standing as it proceeded about [sic] timely raising the issue of standing.

   B) The evidence produced during the hearing showed that the defendant did have the requisite standing.

   C) The search of the premises without either an arrest warrant or a search warrant was clearly unlawful or unconstitutional.

   D) The search was a general search exceeding any lawful proscriptions.

   E) The court erred in not permitting the defendants to reopen the motion to suppress on the issue of standing.

2. The defendant was denied due process of law when her counsel was absent during the proceedings in this case which resulted in the ineffective assistance of counsel.

3. The defendant was denied a fair trial by reason of the actions of the trial judge.

A) The actions of the trial judge toward the defendant denied her a fair tribunal.

B) The court improperly commented upon the credibility of a prosecution witness.

C) The comments by the court in questioning by the court deprived the defendant of a fair trial.

4. The court committed prejudicial error in answering questions of the jury without the presence of counsel.

5. The court committed prejudicial error in allowing photographs into the evidence.

6. The defendant was denied due process of law when she was permitted to be convicted as an alleged aider and abettor without any requirement that she possess the same culpable mental state as the principal offender.

7. The defendant was denied due process of law when the court refused to dismiss the gross sexual imposition count as to this defendant.

8. The defendant was denied due process of law when there is insufficient evidence to convict the defendant of kidnapping.

9. The defendant was subjected to multiple punishments when she was sentenced both for the kidnapping offenses and the offenses of gross sexual imposition.

10. The defendant was denied due process of law when the court immediately sentenced the defendant to maximum terms of imprisonment for each of the offenses for which she was convicted.

11. The court committed prejudicial error in sentencing the defendant for two counts of gross sexual imposition as to Maureen McNea.

12. The court committed prejudicial error and subjected the defendant to cruel and unusual punishment by imposing a sentence which exceeded the statutory maximum sentence.

13. The defendant was denied due process of law when she was convicted and sentenced for kidnappings as first degree felonies.

In an opinion dated April 19, 1984, the court of appeals sustained the Petitioner's twelfth assignment of error insofar as the aggregate minimum sentence Petitioner received violated section 2929.41(E)(2) of the Ohio Revised Code. The court of appeals modified Petitioner's sentence, overruled the remaining assignments of error, and affirmed the Petitioner's conviction and sentence as modified. *State v. Green,* Case No. 47151 (Eighth Judicial District Court of Appeals, 1984).

The Petitioner then filed a motion for leave to appeal, with a memorandum in support of jurisdiction, in the Ohio Supreme Court. In her memorandum the Petitioner cited the following eight (8) propositions of law:

1. A defendant is denied the effective assistance of counsel where counsel absents himself from portions of a defendant's trail [sic] which include a hearing on a motion to suppress, examination of state's witnesses, argument to the jury and instructions of the court.

2. Where the evidence shows that defense counsel has been absent from proceedings concerning a defendant and to which the defendant has entered a protest, the defendant is not required to show prejudice by reason of the absence of counsel.

3. Where the evidence on a hearing of a motion to suppress shows that premises search of those resided in by the defendant is an adequate showing of standing so that the defendant may pursue a motion to suppress.

4. A defendant is denied a full and fair hearing on a motion to suppress where the prosecution during argument and after a hearing on a motion to suppress for the first time raises an issue of standing and the court refuses to allow the reopening of the hearing on the motion to suppress.

5. A defendant is denied a fair trial where the trial judge takes action against the defendant which was improper comments upon the credibility of a prosecution witness and questions witnesses in such manner to show its view on the credibility of the witness.

6. A defendant is denied due process of law when the instructions of the court permit the defendant to be convicted as an aider and abettor without showing that the defendant possesses the same culpable mental state as that of the principal offender.

7. A defendant is subjected to multiple punishment prohibited by the double jeopardy clause when she is sentenced for kidnapping offenses and the offenses of gross sexual imposition arising out of the same occurrence.

8. A defendant is denied due process of law when the court immediately sentenced the defendant to terms of imprisonment in excess of the maximum provided by law immediately upon receipt of the verdict of the jury without any consideration of statutory criteria for sentencing.

The Cuyahoga County Prosecuting Attorney filed a memorandum opposing jurisdiction on August 3, 1984. On September 12, 1984, the Ohio Supreme Court *sua sponte* dismissed Petitioner's appeal for the reason that it presented no substantial constitutional question. *State v. Green,* Case No. 84-1082 (Ohio Supreme Court, 1984).

The Petitioner, with appointed counsel, is now before the United States District Court for the Northern District of Ohio, Eastern Division, seeking federal habeas corpus relief. As grounds for relief the Petitioner sets forth the following six (6) allegations:

Ground one: Denial of the effective assistance of counsel.

Facts: Petitioner states that counsel was hired to represent her, was absent from much of the proceedings due to the fact that counsel was concluding another criminal jury trial at this time and the trial judge in this case would not continue the proceedings until her counsel had concluded the other criminal matter. Counsel was absent from a hearing on a motion to suppress evidence, examination of state's witnesses, argument to the jury and instructions to the jury.

Ground two: Unlawful search and seizure and denial of a full and fair hearing with counsel present.

Facts: Petitioner filed a motion to suppress evidence; her counsel was absent from the proceedings and therefore did not present proper evidence to the court for a consideration of her motion. Her motion was therefore overruled, on the basis that she had no standing although if counsel had been present and petition had testified standing would have been shown.

Ground three: Denial of a fair trial.

Facts: Petitioner was denied a fair trial by reason of the actions of the trial judge which constituted improper comments and the credibility of a prosecution witness and to question witnesses in such a manner to show its view of the credibility of the witness.

Ground four: Denial of due process of law.

Facts: Petitioner was convicted as an aider and abettor. The instructions of the trial court on aiding and abetting were defective for the petitioner could be convicted of that offense without showing she possessed the necessary mental culpable state required for the conviction.

Ground five: Double Jeopardy.

Facts: Petitioner was subjected to the prohibition against multiple punishments for the same offense when she was sentenced for kidnapping offenses and for the offenses of gross sexual imposition arising out of the same occurrence.

Ground six: Denial of due process of law.

Facts: Petitioner, a first offender, was immediately sentenced by the court to maximum consecutive sentences by the court. There is no indication that the court consider [sic] the statutory criteria in imposing the sentences but merely imposed the sentence as a punitive measure against the petitioner for having entered a plea of not guilty and gone to trial upon a plea of not guilty.

STATEMENT OF FACTS

This report includes a review of the transcript that makes up the record of Petitioner's trial in the Cuyahoga County Court of Common Pleas. On the basis of that review this Magistrate finds that the statement of facts contained in the opinion of the Ohio Court of Appeals constitutes a brief and accurate summary of the events in Petitioner's case. Therefore, for the purpose of providing a factual background this Magistrate adopts the rendition of the facts set forth by the Ohio Court of Appeals. 28 U.S.C. § 2254(d) (1982); *Sumner v. Mata,* 449 U.S. 539 (1981) (*Sumner* I); *Loveday v. Davis,* 697 F.2d 139 (6th Cir. 1983). The facts, as set forth in the opinion of the Ohio Court of Appeals, are as follows:

> On September 22, 1982, two persons independently responded to the following advertisement in the classified section of the newspaper: "Receptionist, over 18, for body shop, no typing, will train, 721-4418." After doing so, a similar chain of events occurred with both individuals.
>
> Vicki Steadman answered the ad by phone about 10:00 a.m. and spoke with appellant Pamela Green. Pamela drove to Lyndhurst to pick up Vicki to take her to the interview. When they arrived at 9418 Buckeye Road, Pamela introduced Vicki to Jovan, appellant Wendy Rodgers' four-year-old son, and then later told Jovan to stay in his bedroom. Pamela introduced Vicki to appellant Otis Rodgers.
>
> Otis interviewed Vicki, and then Otis, Pamela and Vicki smoked some marijuana. After meeting Wendy Rodgers, Otis began kissing Vicki after Wendy returned to her bedroom, but Vicki pushed him away. He then took Vicki by the hand into Jovan's bedroom and told Jovan to leave. Otis pulled Vicki onto the bed, pulled her sweater off, unhooked her bra and fondled her. Vicki was afraid and told Otis she had her menstrual period. Otis then laid her on the bed, put his knee on her arms, and ejaculated on Vicki's bare chest.

For her own safety, Vicki told Otis she would think about the job and let him know the next day whether she wanted it. She tried calling her boyfriend for a ride home, but there was no answer. Otis then drove Vicki home.

Later that day at around 2:00 p.m., Maureen McNea responded to the newspaper ad. She was told that the receptionist job had been filled, but that a babysitting job was available. Pamela drove to Maureen's house in Fairview Park to pick up Maureen to take her to the job interview. When they arrived at 9418 Buckeye Road, Pamela introduced Maureen to Jovan. Later, Maureen met Wendy.

After some brief conversation with Wendy, Maureen met Otis. When Otis left the room, Maureen asked to be taken home. Pamela said they would have to wait for the car which allegedly was being repaired. Maureen tried to phone a friend for a ride home, but the line was busy each time she tried.

While the appellants were in the bathroom engaged in bathtub sex, the phone was ringing. Appellants asked Maureen to answer the phone and record the name and race of the person phoning if in response to the newspaper ad. Maureen took several messages.

When the appellants came out of the bathroom, Maureen again asked to use the phone to try to find a ride home. Otis grabbed the phone, put his legs over it, and started laughing. Pamela said she would take Maureen home after she finished curling Otis's hair, but she did not.

Instead, Otis talked to Maureen about becoming a call girl. Maureen was unresponsive, and Otis became aggravated. Wendy and Otis then took Maureen by her arms and threw her into the bedroom. They said it was time for her initiation. Otis attempted to talk Maureen

into having sex with him. He showed her nude photographs, and he pulled her close to him and touched her. Maureen tried to leave the bedroom at that point, but she could not open the bedroom door.

Otis said he was sick of Maureen's excuses. He called Wendy into the bedroom to show Maureen what would happen to her if she did not acquiesce in his demands. Wendy took a gun out of her purse, told Maureen she would be shot, laughed, and threw the gun to Otis. Otis waived the gun at Maureen and told here there was no way she could get out of having sex with him.

Maureen continued trying to talk her way out. Otis again said he was sick of her excuses. At that point, Pamela and Wendy came into the bedroom, held Maureen down on the bed and began undressing her. Otis undressed and got on top of Maureen at which time Maureen broke away. Otis masturbated and ejaculated on himself. Pamela and Wendy got up and said they had to get to work.

Otis asked Maureen if she wanted to go to Dallas with them the next day at noon. Maureen said they would call her and she would let them know. Otis then drove Pamela and Wendy to work and drove Maureen home.

Appellant Wendy Rodgers testified and denied touching Maureen. She stated she was sleeping since she worked in the evenings and did not feel well. She knew that Otis and Maureen were in the other bedroom with the door closed, but she said she trusted Otis. Wendy and Otis had been married two and one-half years, Wendy also testified that Pamela and Maureen left to buy cigarettes and returned. She denied the alleged bathtub sex and said that Maureen was offered the job. Wendy did not know whether Otis touched Vicki.

> On cross-examination Wendy testified that it was important to know the race of the persons calling for the job since she and Otis were an interracial couple which wold be offensive to some people. She also testified that no traveling was necessary for the babysitting job, but it was necessary for the receptionist's job.

State v. Green, Case No. 47151, slip opinion at 2-5 (Eighth Judicial District Court of Appeals, April 19, 1984).

LAW AND ARGUMENT

At the outset this Magistrate notes that the Petitioner has exhausted her state remedies regarding the six (6) grounds for relief advanced by her in her petition for federal habeas corpus relief. Therefore, a review of Petitioner's claims is appropriate. *See Rose v. Lundy,* 455 U.S. 509 (1982).

I.

Petitioner claims as her first ground for relief that she was denied effective assistance of counsel resulting from her attorney's absence at certain points of the trial, and because the trial judge would not grant a continuance to the proceedings until her attorney returned from another trial.

The sixth amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., amend. VI. The United States Supreme Court has held that:

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure

that the trial is fair.

> For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970).

Washington v. Strickland, 104 S. Ct. 2052, 2063-64 (1984).

In *Washington v. Strickland, supra,* the Supreme Court set out a two prong test that a petitioner must meet in order to successfully press a claim of ineffective assistance of counsel. First, counsel's performance must have been so deficient that he was not functioning as "counsel" under the sixth amendment. *Id.* at 2064. Second, the petitioner must also show that the deficient performance prejudiced the defense; that is, counsel's errors must have been so serious as to deprive the petitioner of a fair trial. *Id.*

Petitioner in the instant case contends that "counsel was absent from a hearing on a motion to suppress evidence, examination of state's witnesses, argument to the jury and instruction to the jury." *Green v. Arn,* Case No. C84-3026, Application for Habeas Corpus Writ at 5. Examination of the record indicates that Petitioner's counsel was absent for the pretrial motion to suppress (TR. 4) and for part of the first day of trial which included a portion of the cross-examination of Maureen McNea, one of the alleged victims (TR. 298). The record gives no indication of any other absences. The record indicates that Mr. Carlin was absent due to his involvement in another criminal case (TR. 4). Chronologically, Petitioner's counsel, Mr. Carlin, was absent on Tuesday, May 31, 1983 the first day of the suppression hearing (TR. 4). He was present on Wednesday, June 1, 1983 for the ruling on the motion and at that time joined in the motion to suppress for the record (TR. 131). On Thursday, June 2, 1983, Mr. Carlin was present to make his opening statement (TR. 136). He certainly was not absent from all of the cross-examination of Miss McNea(TR. 167), but apparently missed some of it (TR. 298). On Friday, June 3, 1983, Mr. Carlin was given opportunity to cross-

examine Miss McNea and declined, having stated that Mr. Shaughnessy's cross-examination the previous day was sufficient (TR. 299). He proceeded to cross-examine and re-cross-examine Vicki Steadman (TR. 401) and did the same with Detective Sherwood (TR. 430, 434). He also cross-examined Sergeant Joseph Markey (TR. 468), participated in the renewed motion to suppress (TR. 480), and made a motion in limine (TR. 491). On Monday, June 6, 1983, Mr. Carlin once again raised his motion in limine (TR. 494), reviewed introduction of all of the state's real evidence (TR. 508-542), cross-examined Wendy Rodgers (TR. 685) and Linda Huckaby (TR. 740), participated in opposing the introduction of Lily Henderson's statement (TR. 776), and made his closing argument (TR. 870-78). The record offers no indication that counsel was absent during the arguments to the jury and the instruction to the jury, and Petitioner makes no showing of the same beyond her bare allegations.

As stated above, the record indicates that Mr. Carlin was absentfor the pretrial motion to suppress, and for a portion of the cross-examination of Maureen McNea. The record clearly establishes that the Petitioner gave her consent to Mr. Shaughnessy, her co-defendant's counsel, to represent her at the suppression hearing (TR. 4). In addition, Mr. Carlin joined in the motion to suppress the following day (TR. 131). Regarding Miss McNea's testimony, Mr. Carlin had foreseen the possibility that he would be absent, and discussed it with the trial judge beforehand (TR. 299). At that time, both the judge and Mr. Carlin agreed that Mr. Shaughnessy's cross-examination would be sufficient. Even still, Mr. Carlin was given the opportunity to question Miss McNea the following day, and declined to do so (Tr. 308). He explained that he had discussed the witness' testimony with Mr. Shaughnessy and both agreed that it would be best not to question her further (TR. 404). The record given indicates that the Petitioner may have been involved in the decision (TR. 404).

The Supreme Court has said:

> On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

McMann v. Richardson, 397 U.S. 759, 771 (1970) (footnote omitted). The Petitioner in the instant case herself made motion to the trial court for a continuance (TR. 305-06), appointment of new counsel (TR. 308) and for a mistrial (TR. 403-04), all related to ineffective assistance of counsel, and all were denied. Therefore, it is clear that the trial judge was fully cognizant of the Petitioner's dissatisfaction with her attorney's performance, but nevertheless found no basis for granting her motions.

In *United States v. Yelardy.* 567 F.2d 863 (6th Cir. 1978), the United States Court of Appeals for the Sixth Circuit, in addressing the issue, noted that "[t]he touchstone in the vast majority of right-to-counsel cases is the trial record itself," 567 F.2d at 866, and noted:

> our evaluation of appellant's Sixth Amendment claim turns "not on a mere assessment of particular missteps or omissions by counsel, . . . but on the . . . evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance."

567 F.2d at 865 (quoting *Chambers v. Maroney,* 399 U.S. 42, 60 (1979) (Harlan J., concurring in part and dissenting in part)). After careful examination of the trial transcript, this Magistrate finds that the occasion of Mr. Carlin's absence from the trial

proceedings did not constitute ineffective assistance of counsel under the standard set out in *Washington v. Strickland,* 104 S.Ct. 2052 (1984). First, in examining the record and the rulings by the trial judge, it is not at all clear that the performance by the Petitioner's counsel at trial was deficient. Second, even if there was a deficiency, Petitioner has failed to show how Mr. Carlin's absences resulted in actual prejudice to her case. After carefully examining the record, this Magistrate finds the Petitioner's claims of ineffective assistance of counsel to be without merit.

Petitioner also claims the trial court denied her effective assistance of counsel when the trial judge refused to grant Petitioner's motion for a continuance due to her attorney's absence. The granting of a continuance in a criminal case is within the sound discretion of the trial judge. The United States Supreme Court stated in *Unger v. Sarafite,* 376 U.S. 575 (1964), that:

> The matter of a continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process .... There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

376 U.S. at 589 (citations omitted). A court may consider whether a continuance would cause prejudice to the prosecution. In addition, the court may properly consider whether other continuances have been requested and received, the convenience to witnesses and opposing counsel, and whether the motion is purposeful and dilatory. *Giacolone v. Lucas,* 445 F.2d 1238, 1240 (6th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972).

The burden is upon the party moving for a continuance to establish that the ends of justice require the granting of a

continuance. Section 2954.02 of the Ohio Revised Code states, in pertinent part, that:

> No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

Ohio Revised Code Ann. § 2945.02 (Page 1982).

In the instant case, Petitioner offered no proof that refusal to grant the continuance prejudiced her in any way. Moreover, the court considered among other things the difficulty such a continuance could cause to the prosecution's presentation of witnesses (TR. 306). Finally, the record indicates that the trial judge conferred with counsel in his chambers pursuant to the request (TR. 307), and even before he could make a ruling, the Petitioner moved for the appointment of new counsel (TR. 308). At this point, Petitioner's counsel had returned (TR. 308) and the record reveals no subsequent absences. Therefore, even if the continuance would have been granted, it would have had no effect on the proceedings. This aspect of the Petitioner's first ground for relief is also without merit.

II.

Petitioner also claims that the trial court denied her a full and fair hearing on her motion to suppress evidence obtained during an allegedly illegal search and seizure due to her counsel's absence at the hearing and failure to present evidence of standing. This Magistrate recognizes at the outset that in *Stone v. Powell,* 428 U.S. 465 (1976), the Supreme Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494 (footnotes omitted). Therefore, the Petitioner's second ground for relief must be dismissed if the state courts have given him an "opportunity for full and fair litigation" of his fourth amendment

claim.

The phrase "opportunity for full and fair litigation" is not defined in the Court's opinion in *Stone v. Powell.* So, the courts of appeals have been obliged to define the phrase. *E.g., Joshua v. Maggio,* 674 F.2d 376 (5th Cir.), *cert. denied,* 103 S. Ct. 351 (1982); *Smith v. Maggio,* 664 F.2d 109 (5th Cir. 1981); *Boyd v. Mintz,* 631 F.2d 247 (3d Cir. 1980); *Gamble v. Oklahoma,* 583 F.2d 1161 (10th Cir. 1978); *Gates v. Henderson,* 568 F.2d 830 (2d Cir. 1977), *cert. denied,* 434 U.S. 1038 (1978); *O'Berry v. Wainwright,* 546 F.2d 1204 (5th Cir.), *cert. denied,* 433 U.S. 911 (1977). The United States Court of Appeals for the Sixth Circuit has also addressed the issue of the meaning of the phrase. *Riley v. Gray,* 674 F.2d 522 (6th Cir.), *cert. denied, sub nom. Shoemaker v. Riley,* 103 S. Ct. 266 (1982); *Moore v. Cowan,* 560 F.2d 1298 (6th Cir. 1977), *cert. denied,* 435 U.S. 929 (1978).

In *Riley v. Gray,* the court of appeals noted that in habeas cases raising fourth amendment claims:

> The threshold issue is whether *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), prevents habeas review of the petitioner's fourth amendment claims. *Stone* precludes habeas review "where the State has provided an opportunity for full and fair litigation of a fourth amendment claim..." *Id.* at 494, 96 S. Ct. at 3052. This circuit, in *Moore v. Cowan,* 560 F.2d 1298 (6th Cir. 1977), concluded that *Stone* did not require that the state court rule on the merits of each claim. *Id.* at 1302. Instead, we indicated that the state court need do no more than "take cognizance of the constitutional claim and rule in light thereof." *Id.* Thus, in deciding whether the petitioner received an opportunity for a full and fair hearing in the state court, we must determine whether the state court took "cognizance" of the petitioner's claim.

674 F.2d at 525. The court of appeals concluded that in order to determine whether the state courts took "cognizance" of

the petitioner's claim the federal district court must:

> make two distinct inquiries in habeas proceedings. Initially, the district court must determine whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim. *Williams v. Brown,* 609 F.2d 216, 220 (5th Cir. 1980). Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism. *See Boyd v. Mintz,* 631 F.2d 247, 250 (3rd Cir. 1980); *Gates v. Henderson,* 568 F.2d 830, 840 (2nd Cir. 1977) (*en banc*), *cert. denied,* 434 U.S. 1038, 98 S.Ct. 775, 54 L.Ed.2d 787 (1978).

674 F.2d at 526 (footnote omitted). The court of appeals examined the state procedural mechanism in Ohio and found that:

> The mechanism provided by the State of Ohio for the resolution of fourth amendment claims is, in the abstract, clearly adequate. Ohio R. Crim. P. 12 provides an adequate opportunity to raise fourth amendment claims in the context of a pretrial motion to suppress, as is evident in the petitioner's use of that procedure. Further, a criminal defendant, who has unsuccessfully sought to suppress evidence, may take a direct appeal of that order, as of right, by filing a notice of appeal. See Ohio R. App.P. 3(A) and Ohio R. App. P. 5(A). These rules provide an adequate procedural mechanism for the litigation of fourth amendment claims because the state affords a litigant an opportunity to raise his claims in a fact-finding hearing and on direct appeal of an unfavorable decision.

674 F.2d at 526.

Thus, the dispositive issue is whether Petitioner's presentation of his fourth amendment claim to the state courts was frustrated because of a failure of the State of Ohio's procedural mechanism.

In determining when such a failure occurs, the court in *Gates v. Henderson,* 568 F.2d 830 (2d Cir. 1977), held that *Stone* required only that the state provide opportunity for a full and fair hearing, regardless of whether the defendant takes advantage of it. The court did note though, that when the state provides the opportunity but "the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process [federal habeas relief] may still be warranted." 568 F.2d at 840. The United States Court of Appeals for the Third Circuit in *Boyd v. Mintz,* 631 F.2d 247 (3rd Cir. 1980) found such a breakdown when petitioner was given thirty days to move to suppress after arraignment, but the public defender's office received notice of petitioner's entitlement to be defended by that office with only one day remaining in the period. The motion was not timely made, but the court considered the circumstance as a failure in the state court's mechanism for the purpose of hearing a fourth amendment claim and so allowed petitioner to raise it in federal habeas corpus proceeding.

Similarly, in *Riley v. Gray,* 674 F.2d 522 (6th Cir. 1982) the state court of appeals had held that the petitioner lacked standing but did not discuss or apply *Jones v. United States,* 362 U.S. 257 (1960), which had not yet been overruled by *United States v. Salvucci,* 448 U.S. 83 (1980). The Court in *Jones* held that one charged with possession of contraband need not show that he had standing to challenge the search. The state court's failure to apply *Jones* led it to inquire into whether the petitioner had standing, found no evidence in the record of such, and refused to hear the merits of the claim. *Riley,* 674 F.2d at 527. Subsequently, the district court granted petitioner's writ of habeas corpus and the United States Court of Appeals for the Sixth Circuit affirmed, finding essentially, a failure in the state procedural mechanism, holding that:

> federal habeas relief is available when a criminal defendant is not allowed to fully present his fourth amendment claim in the state courts because of unanticipated and unforeseeable application of a procedu-

> ral rule which prevents state court consideration of the merits of the claim.

Riley v. Gray, 674 F.2d at 527.

There was no such breakdown in the instant case. Petitioner and her co-defendants raised a motion to suppress the evidence obtained in the search and seizure, were given opportunity to argue the motion at the pretrial hearing, and then renewed that motion when the state's exhibits were admitted into evidence at the close of the state's case-in-chief (TR. 480). Further, the Eighth District Court of Appeals of Ohio considered the claim and denied it. Petitioner appealed to the Ohio Supreme Court, which dismissed the appeal *sua sponte.* Even assuming *arguendo* that counsel's absence at the pretrial motion prejudiced petitioner, this is not a breakdown in the state court process. Without a showing of such a breakdown, this Magistrate must find that Petitioner received a full and fair hearing.

In examining the record, this Magistrate notes parenthetically that Mr. Shaughnessy's failure to show standing as a foundational matter at the pretrial hearing may have provided the Petitioner with a ground for post-conviction relief. Under section 2953.21 of the Ohio Revised Code which permits the filing of a petition to vacate a sentence in which there was an infringement of a petitioner's rights under the Ohio or United States Constitution, Petitioner may have claimed ineffective assistance of counsel. *Burrows v. Engle,* 545 F.2d 552 (6th Cir. 1976), *Esherick v. Perini,* 475 F.2d 577 (6th Cir. 1973); *Steed v. Salisbury,* 459 F.2d 475 (6th Cir. 1972). 28 U.S.C. § 2254(b); *Esherick v. Perini,* 475 F.2d 577 (6th Cir. 1973); *Steed v. Salisbury,* 459 F.2d 475 (6th Cir. 1972). Petitioner did not raise this specific issue here, and if he had done so this Magistrate would have been required to recommend dismissal of the petition since it would then have contained an unexhausted claim. 28 U.S.C. § 2254(b) (1982); *Rose v. Lundy,* 455 U.S. 509 (1982). Therefore, this Magistrate finds Petitioner's second ground for relief to be void of merit and recommends that it be dismissed.

III.

As a third assignment of error the Petitioner claims that she was denied a fair trial by reason of certain of the trial judge's actions and comments. The Petitioner first complains that the trial judge authorized a deputy sheriff to search the Petitioner's handbag at any time (TR. 140). In its opinion, the Ohio Court of Appeals for the Eighth District pointed out that the record is void of any showing that such a search took place. Furthermore, the court of appeals noted that the authorization was given outside the jury's presence, and was justified in light of the fact that the Petitioner was out on bond and her co-defendant, Otis Rodgers, was in custody. *State v. Green,* Case No. 47151, slip opinion at 12 (Eighth Judicial District Court of Apeals, 1984).

Petitioner also complains that the trial judge revoked her bond (TR. 404). Once again, the court of appeals noted that the court revoked the bond outside the jury's presence, and after consulting with the Petitioner's counsel reinstated it later in the day (TR. 489-91). In both of these instances, Petitioner has made no attempt to show how the trial court's actions prejudiced her. The court of appeals stated that a trial judge's challenged statements and actions "will not justify a reversal .. where the defendant has failed in light of the circumstances under which the incident occurred to demonstrate prejudice." *State v. Green,* Case No. 47151, slip opinion at 13 (Eighth Judicial District Court of Appeals, 1984). Even if one concedes that these were errors by the trial court, they were certainly not of such magnitude as to "deny fundamental fairness to the criminal trial . . ." *Hills v. Henderson,* 529 F.2d 397, 401 (5th Cir. 1976).

Petitioner also claims the trial judge shed the cloak of impartiality by making improper comments during the testimony of prosecution witness Maureen McNea, one of the victims. Apparently Miss McNea began to exhibit some emotional difficulty in testifying, and the trial judge said, "Okay, you are doing fine. David, do you have some Kleenex?" (TR. 157).

The court of appeals noted the following, concerning this remark:

> Appellant alleges that the court's consideration was a comment which bolstered the victim's testimony. The court's comment was not directed to the substance of her testimony, but was rather a condolence or encouragement to continue in spite of the fact that it may have been difficult for her. Moreover, the trial judge properly instructed the jury regarding any of his comments or actions during the trial. TR. 912-13.

State v. Green, Case No. 47151, slip opinion at 13 (Eighth Judicial District Court of Appeals, 1984).

The trial judge also made comments concerning Mr. Shaughnessy's cross-examination of state witnesses. The judge exhorted Mr. Shaughnessy to confine his cross-examination to questions, rather than "editorial comments" or "speeches" (TR. 284). The Petitioner also objects to the judge's reference to the length of Mr. Shaughnessy's cross-examination in asking the question, "based on Mr. Shaughnessy's lengthy cross-examination, do you have anything further?" (TR. 296). The Petitioner would also claim as error the court's remark to Mr. Shaughnessy on a line of cross-examination: "this is becoming a dead cat at this point, we have kicked it backside, upside, downside, left and right" (TR. 387). The court of appeals noted that Petitioner failed to show any prejudice resulting from these remarks.

In *Brinlee v. Crisp,* 608 F.2d 839 (10th Cir. 1979), the Court of Appeals stated that:

> It is true that a trial judge should never evince the attitude of an advocate, *Gardner v. United States,* 283 F.2d 580, 581 (10th Cir.). However to sustain an allegation of bias by the trial judge as a ground for habeas relief a petitioner must factually demonstrate that during the trial the judge assumed an attitude which went further than an expression of his personal opinion and

> impressed the jury as more than an impartial observer. *Glucksman v. Birns,* 398 F. Supp. 1343, 1350 (S.D. N.Y.). After considering all the claims made and the portions of the case-made cited we are convinced that appellant was not denied the rudimentary requirements of a fair trial. *Pierce v. Page,* 362 F.2d 534, 536 (10th Cir.). Unless they amount to constitutional violations, prejudicial comments and conduct by a judge in a criminal trial are not proper subjects for collateral attack on a conviction. *See Buckelew v. United States,* 575 F.2d 515, 518 (5th Cir.).

608 F.2d at 852-53. This Magistrate believes that the trial judge's comments did not amount to a constitutional violation. In any event, the remarks bear no relation to the Petitioner's case, as Mr. Carlin, and not Mr. Shaughnessy, represented Petitioner.

Finally, Petitioner complains that the trial judge cross-examined Wendy Rodgers (TR. 654-57) and Linda Huckaby (TR. 744-46, 748-49) witnesses for the defense. The court of appeals pointed out that Ohio Rule of Evidence 614(B) permits the trial judge to question witnesses, and that the trial judge did so in an impartial manner. In both of these instances, the judge's aim seemed to be to clarify important but still unclear facts. In questioning Linda Huckaby the court attempted to clarify the color of hair of Otis Rodgers' female companion when they were in the Hollywood Bar on a particular evening. The defense was attempting to establish that this was the victim, Maureen McNea. Therefore, the judge was pursuing a detail significant to the outcome of the case. In Wendy Rodgers' case, the court's questions concerned her apparent inability to identify her own handwriting. The judge even granted a recess in order for her to re-examine the evidence and better testify as to it. This Magistrate finds here no error and no denial of fundamental fairness to the Petitioner.

In *Walker v. Engle,* 703 F.2d 959 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit stated that:

> errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Bell v. Arn,* 536 F.2d 123 (6th Cir. 1976); *Reese v. Cardwell,* 410 F.2d 1125 (6th Cir. 1969). Yet, errors of state law, including evidentiary rulings, which result in a denial of fundamental fairness will support relief in habeas corpus. *Handley v. Pitts,* 491 F. Supp. 597, 599, *aff'd.,* 623 F.2d 23 (6th Cir. 1980); *Maglaya v. Buckhoe,* 515 F.2d 265 (6th Cir.), *cert. denied,* 423 U.S. 931, 96 S. Ct. 282, 46 L.Ed.2d 260 (1975); *Gemel v. Buckhoe,* 358 F.2d 388 (6th Cir. 1966).

Walker v. Engle, 703 F.2d at 962.

The United States Court of Appeals for the Fifth Circuit set out similar criteria for review in *Hills v. Henderson,* 529 F.2d 397 (5th Cir. 1976), stating, "... we examine the record in this case only to determine whether the error was of such a magnitude as to deny fundamental fairness to the criminal trial thus violating the due process clause." 529 F.2d at 401. *Brinlee v. Crisp,* 508 F.2d 839 (10th Cir. 1979). Therefore, this Magistrate may recommend habeas relief not simply on the showing of a state court error, but on a showing that the error was so grave as to amount to a denial of fundamental fairness. None of the words or actions of the trial judge detailed above amounted to such a denial, either individually or collectively. Therefore, this Magistrate recommends that the Petitioner's third ground for relief be dismissed.

IV.

The Petitioner claims the trial court denied her due process of law when the judge's instructions to the jury concerning aiding and abetting in a criminal offense did not include the mens rea requirements. Petitioner failed to object when the instructions were given. The Ohio Court of Appeals cited Rule 30 of the Ohio Rules of Criminal Procedure, which states: "[a] party may not assign as error the giving or the failure to give

any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection." Ohio R. Crim. P. 30(A) (Page 1982). The court of appeals held that Petitioner has waived any error by failing to object pursuant to Rule 30. So, since the court found no plain error in this instance, it overruled this claim on procedural grounds. *State v. Green,* Case No. 47151, slip opinion at 15 (Eighth Judicial District Court of Appeals, 1984). Petitioner must show cause for her failure to timely object, and actual prejudice in order to gain federal habeas corpus review of her claim. *Wainwright v. Sykes,* 433 U.S. 71 (1977). Petitioner has made no such showing. In fact, the trial record indicates that Petitioner's counsel at trial went out of his way to compliment the court on the instructions to the jury (TR. 917). The Petitioner has also made no showing of actual prejudice. Therefore, this ground for relief should be dismissed.

V.

Petitioner raises as a fifth ground for relief that the Double Jeopardy clause of the fifth amendment of the Constitution as made applicable to the states via the fourteenth amendment, prohibited her from being sentenced for kidnapping offenses and offenses of gross sexual imposition because they arose out of the same occurrence.

The Double Jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy for life or limb." U.S. Const., amend. V. The Supreme Court has found "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." *Benton v. Maryland,* 395 U.S. 784, 794 (1969). The constitutional guarantee against double jeopardy consists of three separate protections. It protects against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments

for the same offense. *E.g., North Carolina v. Pearce,* 395 U.S. 711 (1969). The Petitioner's fifth ground for relief involves only the third protection, that against imposition of multiple punishments for the same offense.

Recent decisions by the Supreme Court discussing the application of the Double Jeopardy clause indicate that where a defendant has been tried for several offenses in the same proceeding the question of whether separate punishments may be imposed is primarily one of legislative intent. In *Brown v. Ohio,* 432 U.S. 161 (1977), the Supreme Curt considered the appeal of a defendant who had been convicted and sentenced in separate proceedings for two related offenses (joyriding and the greater offense of automobile theft) which had arisen out of the same general criminal transaction. The Court noted that:

> the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

Brown v. Ohio, 432 U.S. at 165 (footnote omitted). The question then, was "whether auto theft and joyriding . . . constitute the 'same offense' under the Double Jeopardy Clause." *Brown,* 432 U.S. at 164. The Court then noted that:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States,* 284 U.S. 299, 304 (1932):
>
> > "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only

> one, is whether each provision requires proof of a fact which the other does not. . . ."
>
> This test emphasizes the elements of the two crimes. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." *Iannelli v. United States,* 420 U.S. 770, 785 n. 17 (1975).

Brown v. Ohio, 432 U.S. at 166. The Court then applied the *Blockburger* test, determined that the offenses in question were the same for Double Jeopardy purposes, and reversed the decision of the Ohio Court of Appeals. *Brown v. Ohio,* 432 U.S. at 170.

The *Blockburger* test was dispositive in *Brown* for determining legislative intent. In *Whalen v. United States,* 445 U.S. 684 (1980), the Court looked first to the penal statutes themselves and then legislative history to discern legislative intent as to the imposition of consecutive sentences by a District of Columbia court for rape and felony murder committed in the course of the rape. Though the statutes themselves expressed no clear intent, another District of Columbia code section specifically addressed the issue of when the imposition of consecutive sentences would be permissible. That section in essence had adopted the *Blockburger* test which the Court then applied in that case and found that the offenses in question were the same offense for sentencing purposes, and that consecutive sentences were not permissible. *Whalen,* 445 U.S. at 694-95.

The Supreme Court considered a federal district court's imposition of consecutive sentences for conspiracy to import marijuana and conspiracy to distribute marijuana, in *Albernaz v. United States,* 450 U.S. 333 (1981). Again the central question was what punishment the Legislative Branch intended to be imposed. Examination of the federal penal statutes in question and their legislative history failed to resolve the issue, so the Court applied the *Blockburger* test. In doing so, the Court

found that the offenses in question were not the same offense, and so reached the conclusion that Congress had intended to authorize multiple punishments. However, the Court noted that:

> The *Blockburger* test is a "rule of statutory construction," and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent.

Albernaz v. United States, 450 U.S. at 340.

In *Missouri v. Hunter,* 459 U.S. 359 (1983), the Supreme Court considered the appeal of a defendant convicted in a single trial of the state offenses of first degree robbery and armed criminal action. The Missouri Supreme Court had concluded that under the *Blockburger* test these offenses were the same and that consequently the Double Jeopardy clause prohibited cumulative punishment for both offenses. The Supreme Court vacated the judgment and remanded the case, stating that:

> Thus far, we have utilized that rule only to limit the federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Missouri v. Hunter, 459 U.S. at 368-69 (footnote omitted).

Thus, the Supreme Court has indicated that the *Blockburger* test is not dispositive. The intent of the legislative body is the dispositive factor regarding any question of whether or not cumulative punishment is permitted by the Double Jeopardy clause. The *Blockburger* test is only a rule of statutory construction to be used to divine legislative intent in those instances when such intent cannot be found solely by examining the penal statutes in question and their relevant legislative history.

The Petitioner in the instant case claims that the trial court violated her constitutional protection guaranteed by the Double Jeopardy clause when it sentenced her to cumulative punishments for kidnapping and gross sexual imposition. The court sentenced Petitioner to an indeterminate term of imprisonment of from seven (7) to twenty-five (25) years on each of the two (2) kidnapping counts, and to an indeterminate term of imprisonment of from two (2) to five (5) years on each of the three (3) gross sexual imposition counts, the terms to run consecutively to each other. Following the Supreme Court decision discussed above, the determinative issue is what punishment did the legislature intend to be imposed? As in *Whalen v. United States*, 445 U.S. 684 (1980), Ohio has a statute, section 2941.25 of the Ohio Revised Code, that specifically treats multiple punishments for multiple counts. Section 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Ohio Revised Code Ann. § 2941.25 (Page 1982).

The Ohio General Assembly has authorized trial courts, in a single criminal proceeding, to convict and cumulatively sentence a defendant for two or more offenses arising out of the same criminal transaction only when: (1) the offenses are not allied offenses of similar import; (2) the offenses were committed separately; or (3) the offenses were committed with a separate animus as to each. Ohio Revised Code Ann. § 2941.25 (Page 1982). *E.g., State v. Moss,* 69 Ohio St. 2d 515, 23 Ohio Op. 3d 447 (1982); *State v. Rice,* 69 Ohio St. 2d 422, 23 Ohio Op. 3d 374 (1982); *State v. Logan,* 60 Ohio St. 2d 126, 14 Ohio Op. 3d 373 (1979).

In order for two crimes to constitute "allied offenses of similar import" there must be a recognized similarity between the elements of the crimes committed; that is, the offenses and their elements must correspond to such a degree that commission of the one offense will result in the commission of the other. *E.g., State v. Johnson,* 6 Ohio St. 3d 420 (1983); *State v. Mitchell,* 6 Ohio St. 3d 416 (1983); *State v. Moss,* 69 Ohio St. 2d 515, 23 Ohio Op. 3d 447 (1982); *State v. Logan,* 60 Ohio St. 2d 126, 14 Ohio Op. 3d 373 (1979); *State v. Donald,* 57 Ohio St. 2d 71, 11 Ohio Op. 3d 242 (1979).

The Petitioner was found guilty of kidnapping, a violation of section 2905.01(A) (4) of the Ohio Revised Code. Section 2905.01(A) (4) states:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:
>
> . . . .
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against his will.

Ohio Revised Code Ann. § 2905.01(A) (4) (Page 1982). Petitioner was also found guilty of gross sexual imposition, a violation of section 2907.05(A)(1). Section 2907.05(A)(1) provides:

> (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons, to have sexual contact when any of the following apply:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

Ohio Revised Code Ann. § 2907.05(A) (1) (Page 1982).

One must first look to state court decisions in determining whether kidnapping and gross sexual imposition are "allied offenses of similar import". The court of appeals in this case considered the issue and held:

> Appellants correctly assert that rape and kidnapping may be allied offenses pursuant to Ohio Rev. Code § 2941.25(A). However, this result does not necessarily follow in each case. Where acts of similar import are significantly independent and are committed separately, they may be multiply punished under Ohio Rev. Code § 2941.25(B). *State v. Ware* (1980), 63 Ohio St. 2d 84.

State v. Green, Case No. 47151, slip opinion at 8 (Eighth Judicial District Court of Appeals, 1984).

The only case that research yields actually addressing the issue is *State v. Moralevitz,* 70 Ohio App. 2d 20, 24 Ohio Op.3d 16 (Cuyahoga Co. Ct. App. 1980). The court held that the offenses of kidnapping and gross sexual imposition are not "allied offenses of similar import" since they do not have sufficient elements in common that the commission of one

offense will result in the commission of the other offense. However, the case is not on point since the victim in *State v. Moralevitz, supra,* was less than thirteen (13) years of age and so came under section 2907.05(A)(3) and not section 2907.05-(A)(1) of the Ohio Revised Code as in the instant case. Therefore, the common element missing between the two offenses of kidnapping and gross sexual imposition in *State v. Moralevitz, supra,* was force.

Distinguishing the instant case from *State v. Moralevitz, supra,* the Petitioner was convicted under section 2907.05-(A)(1) which requires that the offender purposely compel the other person to submit to sexual contact by force or threat of force, rather than section 2907.05(A)(3) which has no such requirement. It would seem then, that if the kidnapping count involved the restraining for the purpose of engaging in sexual activity as the Petitioner contends, *Green v. Arn,* Case No. C84-3026, Application for Writ of Habeas Corpus at 22, the two offenses may have sufficient similar elements or sufficient common elements to find that kidnapping and gross sexual imposition in this case are allied offenses of similar import. Yet the record (TR. 822) seems to clearly indicate that the kidnapping charge was based on asportation by deception, rather than by force or threat. The Petitioner removed the victims from their homes by means of deception for the purpose of engaging in sexual activity with the victims against their wills. Though force or threat is a necessary element of the crime of gross sexual imposition under section 2907.05(A)(1), deception is not. Therefore, since there has been no precise determination on the issue by Ohio courts, this Magistrate finds that kidnapping by deception and gross sexual imposition by force or threat of force are not allied offenses of similar import. The Petitioner may be sentenced consecutively for both offenses without a violation of the Double Joepardy clause.

Even assuming *arguendo* that these offenses are allied and of similar import, the Petitioner must still avoid the requirements of section 2941.25(B) of the Ohio Revised Code, because:

> Even though there might be a shield initially provided a defendant under R.C. § 2941.25(A) where charged with multiple counts, he still must overcome the hurdle of R.C. § 2941.25(B). This section, in essence, provides that notwithstanding the fact that a defendant is charged with two or more offenses of the same or similar kind he may be convicted of all of them if he committed them separately, or if he possessed a separate "animus" as to each. In so providing, R.C. § 2941.25(B) "carves an exception to division (A) of the same statutue***." *State v. Frazier, supra,* at pages 255 [of Ohio St. [sic], page 264 of O.O.3d].

State v. Logan, 60 Ohio St.2d 126, 129, 14 Ohio Op. 3d 373, 375 (1979). *E.g., State v. Johnson,* 6 Ohio St.3d 420 (1983); *State v. Ware,* 63 Ohio St. 2d 84, 17 Ohio Op.3d 51 (1980); *State v. Price,* 60 Ohio St.2d 136, 14 Ohio Op.3d 379 (1979).

As the court of appeals noted, the kidnapping in the instant case included the asportation of the victims from their homes to 9418 Buckeye Road. The incidents of gross sexual imposition all took place subsequent to the kidnapping. Even if one considers the kidnapping count to be based on the forced confinement in the apartment, the forced sexual contact in the bedroom was significantly independent from the forced restraint within the entire apartment to constitute two separate offenses. *State v. Green,* Case No. 47151, slip opinion at 9 (Eighth Judicial District Court of Appeals, 1984). Therefore, the offenses were distinct and separable, and the Petitioner could also have been convicted under section 2941.25(B) of the Ohio Revised Code. This Magistrate finds that the Petitioner's fifth ground for relief is without merit and recommends that it be dismissed.

IV.

In her last ground for relief, the Petitioner claims that the trial court denied her due process of law by immediately sentencing her to maximum terms of imprisonment upon receipt of the

jury's verdict without considering the sentencing criteria set out by the state statute. Petitioner also maintains that the trial court imposed the sentence as a punitive measure against the Petitioner for having entered a plea of not guilty. Section 2929.12(A) of the Ohio Revised Code requires that:

> (A) In determining the minimum term of imprisonment to be imposed for felony, and in determining whether to impose a fine for felony and the amount and method of payment of a fine, the court shall consider the risk that the offender will commit another crime and the need for protecting the public from the risk; the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 [2947.05.1] of the Revised Code, if a victim impact statement is required by that section; the history, character, and condition of the offender and his need for correctional or rehabilitative treatment; and the ability and resources of the offender and the nature of the burden that payment of a fine will impose on him.

Ohio Revised Code Ann. § 2929.12(A) (Page 1982).

The court of appeals modified the trial court's sentence pursuant to Ohio Revised Code section 2929.41(E)(2). That section provides that consecutive terms shall not exceed an aggregate minimum of fifteen (15) years. The trial court sentenced the petitioner to an aggregate minimum term of twenty (20) years and so the court of appeals reduced the sentence to a fifteen (15) year minimum. Otherwise, the appeals court found no abuse of discretion in sentencing and held that the trial court did not ignore the statutory sentencing factors. *State v. Green,* Case No. 47151, slip opinion at 17 (Eighth Judicial District Court of Appeals, 1984).

It is axiomatic that a due process claim in a petition for a writ of habeas corpus must show a violation of fundamental fairness. The United States Court of Appeals for the Ninth Circuit has noted that:

> Ordinarily matters of rules of sentencing adopted by the state courts do not raise constitutional issues which may be reached by habeas proceedings.

Johnson v. Angora, 462 F.2d 1352, 1353 (9th Cir. 1972). *See Niemann v. Paratt,* 596 F.2d 316, 317 (8th Cir. 1979); *Wright v. Maryland,* 429 F.2d 1101, 1103 (4th Cir. 1970); *United States ex rel. Long v. Pete,* 418 F.2d 1028, 1031 (7th Cir. 1969); *Coleman v. Koloski,* 415 F.2d 745, 746 (6th Cir. 1969).

Petitioner has failed to cite any place in the record to substantiate her claim that the trial court disregarded the statutory sentencing guidelines. Instead she infers this from the fact that she was sentenced shortly after the jury returned its verdict. Petitioner also makes no attempt to show what factors specific to her circumstances the trial court allegedly failed to consider, and why her sentence would be different if the court had considered them. This is especially significant since the court of appeals explicitly held that the trial court did not ignore the statutory sentencing factors.

Petitioner's contention that this was her first offense is flatly contradicted by Mr. Fallon's (Assistant Prosecuting Attorney) Memorandum Opposing Jurisdiction to the Ohio Supreme Court. Mr. Fallon states that "the trial court had before it the court file which contained the F.B.I. 'rap sheet' of the appellant which indicated that this was not her first or only offense." *State v. Green,* Case No. 84-1082, Memorandum Opposing Jurisdiction in the Supreme Court of Ohio at 27.

Finally, Petitioner alleges, but makes absolutely no attempt to substantiate, that her sentence reflects the trial court's intention to punish her for entering a plea of not guilty. The record gives no such indication. Without substantiation by the Petitioner, this Magistrate must recommend that the claim be dismissed as a frivolous and unfounded allegation. Based on the foregoing, this Magistrate recommends that Petitioner's sixth ground for relief be dismissed.

CONCLUSION AND RECOMMENDATION

Following a thorough review of the record, pleadings, and applicable law, this Magistrate arrives at the following conclusions:

(1) Petitioner has failed to show that she is in custody in violation of the constitution, laws, or treaties of the United States as required by Title 28, United States Code, section 2254;

(2) an evidentiary hearing is not required under the criteria of Title 28, United States Code, section 2254(d). *Townsend v. Sain,* 372 U.S. 293 (1963).

Therefore, this Magistrate respectfully recommends that the Petitioner's application for habeas corpus be denied and dismissed.

/s/ Charles R. Laurie
Charles R. Laurie
United States Magistrate

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to Stuart A. Cole, Assistant Attorney General, Office of the Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, and to Paul Mancino, Jr., One Public Square Building, Suite 1001, Cleveland, Ohio 44113, this *25th* day of January, 1985 by regular

United States Mail.

/s/ Charles R. Laurie
Charles R. Laurie
United States Magistrate

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee

v.

WENDY RODGERS,
Defendant-Appellant

and OTIS RODGERS.
Defendant-Appellant

and PAMELA GREEN,
Defendant-Appellant.

OPINION
CASES NOS. 47146/47147/47151
[File stamp deleted]

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NAHRA, J.

Appellants, Pamela Green, Wendy Rodgers and Otis Rodgers, are appealing their convictions in a jury trial of two counts of kidnapping and three counts of gross sexual imposition. For the reasons set forth below, we modify appellants' convictions and, as modified, affirm them.

On September 22, 1982, two persons independently responded to the following advertisement in the classified section of the newspaper: "Receptionist, over 18, for body shop, no typing, will train, 721-4418." After doing so, a similar chain of events occurred with both individuals.

Vicki Steadman answered the ad by phone about 10:00 a.m. and spoke with appellant Pamela Green. Pamela drove to Lyndhurst to pick up Vicki to take her to the interview. When they arrived at 9418 Buckeye Road, Pamela introduced Vicki to Jovan, appellant Wendy Rodgers' four-year-old son, and then later told Jovan to stay in his bedroom. Pamela introduced Vicki to appellant Otis Rodgers.

Otis interviewed Vicki, and then Otis, Pamela and Vicki smoked some marijuana. After meeting Wendy Rodgers, Otis began kissing Vicki after Wendy returned to her bedroom, but Vicki pushed him away. He then took Vicki by the hand into Jovan's bedroom and told Jovan to leave. Otis pulled Vicki onto the bed, pulled her sweater off, unhooked her bra and fondled her. Vicki was afraid and told Otis she had her menstrual period. Otis then laid her on the bed, put his knees on her arms, and ejaculated on Vicki's bare chest.

For her own safety, Vicki told Otis she would think about the job and let him know the next day whether she wanted it. She tried calling her boyfriend for a ride home, but there was no answer. Otis then drove Vicki home.

Later that day at around 2:00 p.m., Maureen McNea responded to the newspaper ad. She was told that the receptionist job had been filled, but that a babysitting job was available.

Pamela drove to Maureen's house in Fairview Park to pick up Maureen to take her to the job interview. When they arrived at 9418 Buckeye Road, Pamela introduced Maureen to Jovan. Later, Maureen met Wendy.

After some brief conversation with Wendy, Maureen met Otis. When Otis left the room, Maureen asked to be taken home. Pamela said they would have to wait for the car which allegedly was being repaired. Maureen tried to phone a friend for a ride home, but the line was busy each time she tried.

While the appellants were in the bathroom engaged in bath-tub sex, the phone was ringing. Appellants asked Maureen to answer the phone and record the name and race of the person phoning if in response to the newspaper ad. Maureen took several messages.

When the appellants came out of the bathroom, Maureen again asked to use the phone to try to find a ride home. Otis grabbed the phone, put his leg over it, and started laughing. Pamela said she would take Maureen home after she finished curling Otis's hair, but she did not.

Instead, Otis talked to Maureen about becoming a call girl. Maureen was unresponsive, and Otis became aggravated. Wendy and Otis then took Maureen by her arms and threw her into the bedroom. They said it was time for her initiation. Otis attempted to talk Maureen into having sex with him. He showed her nude photographs and he pulled her close to him and touched her. Maureen tried to leave the bedroom at that point but she could not open the bedroom door.

Otis said he was sick of Maureen's excuses. He called Wendy into the bedroom to show Maureen what would happen to her if she did not acquiesce in his demands. Wendy took a gun out of her purse, told Maureen she would be shot, laughed, and threw the gun to Otis. Otis waved the gun at Maureen and told her there was no way she could get out of having sex with him.

Maureen continued trying to talk her way out. Otis again said he was sick of her excuses. At that point, Pamela and Wendy came into the bedroom, held Maureen down on the bed and began undressing her. Otis undressed and got on top of Maureen at which time Maureen broke away. Otis masturbated and ejaculated on himself. Pamela and Wendy got up and said they had to get to work.

Otis asked Maureen if she wanted to go to Dallas with them the next day at noon. Maureen said they could call her and she would let them know. Otis then drove Pamela and Wendy to work and drove Maureen home.

Appellant Wendy Rodgers testified and denied touching Maureen. She stated she was sleeping since she worked in the evenings and she did not feel well. She knew that Otis and Maureen were in the other bedroom with the door closed, but she said she trusted Otis. Wendy and Otis had been married two and one-half years. Wendy also testified that Pamela and Maureen left to buy cigarettes and returned. She denied the alleged bathtub sex and said that Maureen was offered the job. Wendy did not know whether Otis touched Vicki.

On cross-examination Wendy testified that it was important to know the race of the persons calling for the job since she and Otis were an interracial couple which would be offensive to some people. She also testified that no traveling was necessary for the babysitting job, but it was necessary for the receptionist's job.

Appellants Wendy and Otis Rodgers have raised two assignments of error. These two assignments, along with appellant Pamela Green's first and ninth assignments of error, respectively, will be discussed first. The remainder of this opinion will address Pamela Green's remaining assignments of error.

I.

Appellants' Rodgers' first assignment of error is that:

> THE TRIAL COURT ERRED IN OVERRULING DEFENDANTAPPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED IN THE WARRANTLESS SEARCH OF DEFENDANT'S HOME IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Appellant Green's first assignment of error is that:

> 1. THE COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE MOTION OF THE DEFENDANT TO SUPPRESS EVIDENCE.
>
> A) THE STATE WAIVED ITS RIGHT TO OBJECT ON THE BASIS OF STANDING AS IT PROCEEDED ABOUT [SIC] TIMELY RAISING THE ISSUE OF STANDING.
>
> B) THE EVIDENCE PRODUCED DURING THE HEARING SHOWED THAT THE DEFENDANT DID NOT HAVE THE REQUISITE STANDING.
>
> C) THE SEARCH OF THE PREMISES WITHOUT EITHER AN ARREST WARRANT OR A SEARCH WARRANT WAS CLEARLY UNLAWFUL OR UNCONSTITUTIONAL.
>
> D) THE SEARCH WAS A GENERAL SEARCH EXCEEDING ANY LAWFUL PROSCRIPTIONS.
>
> E) THE COURT ERRED IN NOT PERMITTING THE DEFENDANTS TO REOPEN THE MOTION TO SUPPRESS ON THE ISSUE OF STANDING.

As proponents of a motion to suppress, appellants have the burden of establishing that their Fourth Amendment rights

have been violated. *United States v. Salvucci,* 448 U.S. 83 (1980); *Rakas v. Illinois,* 439 U.S. 128 (1978); *Brown v. United States,* 411 U.S. 223 (1973); *United States v. Molina-Garcia,* 634 F.2d 217 (5th Cir. 1981); *State v. Steele* (1981), 2 Ohio App. 3d 105. Appellants must prove facts sufficient to establish their legitimate expectations of privacy in the area searched. *State v. Steele* (1981), 2 Ohio App. 3d 105, 107. Even defendants charged with crimes of possession must establish their privacy interests; automatic standing is no longer warranted. *United States v. Salvucci,* 448 U.S. 83 (1980).

Appellants made no attempt whatsoever to assert any interest in the searched upper portion of the house or to establish their legitimate expectations of privacy in those rooms. Nor did appellants attach affidavits to their written motions to suppress to establish their privacy interests. A trial court cannot be expected to assume that privacy interests exist. Nor can the court take judicial notice of the addresses provided by appellants contained in their files to establish standing without some minimum showing that appellants expected privacy within the areas searched at those addresses. *See generally Rakas v. Illinois,* 439 U.S. 128, 148 (1978). Since appellants failed to produce any evidence of their privacy interests, appellants clearly have not met their burden of proof of establishing their right to challenge the lawfulness of the search. *See United States v. Molina-Garcia,* 634 F.2d 217 (5th Cir. 1981); *State v. Steele* (1981), 2 Ohio App. 3d 105, 109. Nor was standing established by appellee's witnesses. Therefore, we need not reach the issue of the legality of the search. Accordingly, the trial court's ruling was proper and appellants' first assignments of error are overruled.

Appellant Pamela Green has further argued that appellee did not timely object on the standing issue. The record indicates that defense counsel Shaughnessy, who was acting on behalf of Pamela at the suppression hearing since her counsel was unavailable, told the court that evidence would come out to establish standing. Tr. 4-5. The defense called no witnesses (Tr. 85), and because the defense had the burden of proof, the defense argued first. Appellee argued the standing issue at the

first and only available opportunity. Appellee, therefore, acted timely. Appellant Green also argues that the trial court erred when it would not reconsider her motion to suppress during trial after appellants set forth evidence of standing. Clearly, a motion to suppress is a pre-trial motion, Ohio R. Crim. P. 12(B), which must be timely determined prior to trial, Ohio R. Crim. P. 12(E). Otherwise, the state loses its right to appeal from the motion prior to trial, and jeopardy attaches so that the state is without recourse following trial. The trial court, therefore, did not err when it failed to reconsider appellant's motion to suppress during trial.

II.

Appellants' Rodgers' last assignment of error is that:

> THE TRIAL COURT ERRED IN SENTENCING DEFENDANT-APPELLANT TO CONSECUTIVE SENTENCES IN VIOLATION OF REVISED CODE §2941.25 BECAUSE THE CRIME OF KIDNAPPING AND GROSS SEXUAL IMPOSITION ARE OF SIMILAR IMPORT.

Appellant Green's ninth assignment of error is that:

> THE DEFENDANT WAS SUBJECTED TO MULTIPLE PUNISHMENTS WHEN SHE WAS SENTENCED BOTH FOR THE KIDNAPPING OFFENSES AND THE OFFENSES OF GROSS SEXUAL IMPOSITION.

Appellants argue that because rape and kidnapping are allied offenses, and because rape and gross sexual imposition are so closely related, that it necessarily follows that kidnapping and gross sexual imposition are also allied offenses.

Appellants correctly assert that rape and kidnapping may be allied offenses pursuant to Ohio Rev. Code §2941.25(A). However, this result does not necessarily follow in each case. Where acts of similar import are significantly independent and are committed separately, they may be multiply punished

under Ohio Rev. Code §2941.25(B). *State v. Ware* (1980), 63 Ohio St. 2d 84.

In the instant case, it was not error to convict appellants for both gross sexual imposition and kidnapping under the facts adduced at trial. The asportation by deception which constituted kidnapping was independent of the gross sexual imposition acts. Further, the forced sexual contact in the bedroom was significantly independent from the forced restraint on the victims' liberty within the entire apartment to preclude merger of the two convictions. Accordingly, these assignments of error are overruled.

III

Appellant Green's second assignment of error is that:

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HER COUNSEL WAS ABSENT DURING THE PROCEEDINGS IN THIS CASE WHICH RESULTED IN THE INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant alleges that her counsel was absent during the suppression hearing, at the time of Ms. Steadman's testimony, at the time the exhibits were introduced, when the motion to suppress was renewed, during the prosecutor's closing argument, at the time of a jury question during deliberations, and that her counsel failed to cross-examine Ms. McNea. Appellant alleges she was denied effective assistance of counsel as a result of these claims.

The Supreme Court of Ohio has set forth the following test to be applied when an accused alleges ineffective assistance of counsel: "Balancing the rights of the accused and of the public, we hold the test to be whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St. 2d 71, 79. Further, the Ohio Supreme Court has required a substantial violation of an essential duty of defense counsel coupled with prejudice.

State v. Lytle (1976), 48 Ohio St.2d 391, 396-97, *death penalty vacated,* 438 U.S. 910 (1978). The burden of proof is on the appellant. *Id.* at 397.

Based upon the record, appellant has failed to sustain her burden of proof. Appellant gave her permission to defense attorney Shaughnessy to proceed on her behalf at the suppression hearing in Mr. Carlin's, appellant's attorney's, absence. Tr. 5. Mr. Carlin was not absent during all of Ms. McNea's testimony. Tr. 167, 251-52, 258. When appellant objected to her counsel's partial absence, the court recessed, discussed the matter with counsel and appellant in chambers, and then adjourned until the next day. Tr. 305-07. The next day, Mr. Carlin indicated he had no questions for Ms. McNea, Tr. 308, and that the decision to not cross-examine Ms. McNea was a tactical decision in which appellant concurred, Tr. 403-04.

With regard to Ms. Steadman, the record does not reflect Mr. Carlin's absence or presence during her direct testimony. Mr. Carlin did, however, cross-examine Ms. Steadman, Tr. 389-99, and recross-examine Ms. Steadman, Tr. 401-02.

Mr. Carlin was present at the introduction of the state's evidence. Tr. 508-41. In fact, the trial judge gave Mr. Carlin the opportunity to object to any exhibits previously stipulated to by Mr. Shaughnessy in the event Mr. Carlin was absent at the time. Tr. 509-10.

At the time Mr. Shaughnessy renewed the motion to suppress, he also renewed it on behalf of Mr. Carlin. Tr. 480. Moreover, the record indicates that Mr. Carlin may very well have been present at this time. Tr. 167, 491.

The record does not reflect Mr. Carlin's absence or presence during the prosecutor's entire closing argument. It appears, however, that Mr. Carlin was not totally absent since Mr. Carlin stated to the court at the commencement of his own closing argument that his argument would not be as long as the prosecutor's or Mr. Shaughnessy's closings.

Finally, with regard to the jury's question and the court's response, the record indicates that the court discussed the matter with counsel. Tr. 923. Since the record contradicts appellant's claims, this assignment of error is overruled.

IV.

Appellant's third assignment of error is that:

3. THE DEFENDANT WAS DENIED A FAIR TRIAL BY REASON OF THE ACTIONS OF THE TRIAL JUDGE.

   A) THE ACTIONS OF THE TRIAL JUDGE TOWARD THE DEFENDANT DENIED HER A FAIR TRIBUNAL.

   B) THE COURT IMPROPERLY COMMENTED UPON THE CREDIBILITY OF A PROSECUTION WITNESS.

   C) THE COMMENTS BY THE COURT IN QUESTIONING BY THE COURT DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

Appellant specifically alleges she was denied a fair trial since the trial judge (1) authorized the search of ladies' bags at any time; (2) revoked appellant's bond; and (3) made various comments and asked various questions throughout the trial.

A trial judge's challenged statements and actions "will not justify a reversal . . . where the defendant has failed in light of the circumstances under which the incidents occurred to demonstrate prejudice." *State v. Wade,* 53 Ohio St. 2d 182 (Syl. 2), *death penalty vacated,* 438 U.S. 911 (1978). An appellate court will adhere to the following rules when determining whether a trial judge's remarks were prejudicial:

(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the

> trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel.

State v. Wade, 53 Ohio St. 2d at 188. Further, an appellate court will consider the lower court's charge to the jury, whether the instruction informed the jury of its role as factfinder, *State v. Sutton* (l966), 7 Ohio App. 2d 178, 180, and its role as the determiner of credibility.

Outside the presence of the jury, the court told the deputies that they could search the ladies' bags at any time if they were concerned about anything being passed between the defendants. Tr. 140. The record is void of any indication that a search in fact took place. Even if a search occurred, it was reasonable in light of the fact that appellant Green was out on bond and appellant Otis Rodgers was in custody. In any event, appellant has failed to show how the trial court's order prejudiced her trial.

Prior to a lunch break, the court revoked appellant's bond. Tr. 404. Later that same day, the court reinstated appellant's bond and stated the reasons for revoking appellant's bond which were made known to Mr. Carlin and appellant earlier. Tr. 489-91. Even if the court erred in revoking appellant's bond, it was outside the jury's presence, reinstated after lunch, and appellant has failed to show prejudice which denied her a fair trial.

During Ms. McNea's testimony, the trial judge stated: "Okay. You are doing fine. David, do you have some Kleenex?" Tr. 157. Appellant alleges that the court's consideration was a comment which bolstered the victim's testimony. The court's comment was not directed to the substance of her testimony, but was rather a condolence or encouragement to continue in spite of the fact that it may have been difficult for her.

Moreover, the trial judge properly instructed the jury regarding any of his comments or actions during the trial. Tr. 912-13.

Appellant has failed to show prejudice regarding the remaining comments of the trial judge directed to the co-defendants' counsel. The trial judge is permitted to interrogate witnesses. Ohio R. Evid. 614(B). The record indicates the trial judge did so in an impartial manner. For all of the above reasons, appellant's third assignment of error is overruled.

V.

Appellant's fourth assignment of error is that:

> THE COURT COMMITTED PREJUDICIAL ERROR IN ANSWERING QUESTIONS OF THE JURY WITHOUT THE PRESENCE OF COUNSEL.

Contrary to what appellant argues, the record indicates that the court discussed the jury's questions with counsel before responding in writing. No error is alleged with respect to the substance of the response. Tr. 923. Appellant's assignment is therefore overruled.

VI.

Appellant's fifth assignment of error is that:

> THE COURT COMMITTED PREJUDICE ERROR IN ALLOWING PHOTOGRAPHS INTO THE EVIDENCE.

Nude photographs of the appellants were admitted into evidence over the objections of both defense attorneys. Whether photographs are relevant or, if relevant, unfairly prejudicial, rests within the sound discretion of the trial court. *State v. Hill* (1967), 12 Ohio St. 2d 88; *State v. Rivers* (1977), 50 Ohio App. 2d 129. The photographs were documentary evidence regarding the subject matter of prostitution which was being discussed.

Appellants Wendy and Otis Rodgers threw Ms. McNea into the bedroom for her initiation, and later appellant Green helped secure Ms. McNea for her initiation. Based upon the circumstances of these offenses, the trial court did not abuse its discretion. This assignment of error is overruled.

VII.

Appellant's sixth assignment of error is that:

> THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN SHE WAS PERMITTED TO BE CONVICTED AS AN ALLEGED AIDER AND ABETTOR WITHOUT ANY REQUIREMENT THAT SHE POSSESS THE SAME CULPABLE MENTAL STATE AS THE PRINCIPAL OFFENDER.

It is axiomatic that the failure to object to jury instructions waives any error therein except for plain error. Ohio R. Crim. P. 30(A); *see State v. Underwood* (1983), 3 Ohio St. 3d 12 (Syl.). Mr. Carlin did not object and, in fact, indicated he was well satisfied with the instructions given to the jury. Tr. 917.

In determining whether plain error exists, the Supreme Court of Ohio has stated that:

> In determining the question of prejudicial error in instructions to the jury, the charge must be taken as a whole, and the portion that is claimed to be erroneous or incomplete must be considered in its relation to, and as it affects and is affected by the other parts of the charge. If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results.

State v. Hardy (1971), 28 Ohio St. 2d 89, 92. After analyzing the charge as a whole, including the instances where the trial court repeatedly instructed as to the required culpable *mens*

rea for the offenses and the instructions to keep the defendants separate, we are convinced that plain error does not exist in this instance. Accordingly, appellant's assignment of error is overruled.

VIII.

Appellant's seventh and eighth assignments of error are that:

> THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT REFUSED TO DISMISS THE GROSS SEXUAL IMPOSITION COUNT AS TO THIS DEFENDANT; and
>
> THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THERE IS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF KIDNAPPING.

A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt. *State v. Eley* (l978), 56 Ohio St. 2d 169 (Syl.).

A charge of complicity, *i.e.*, aiding and abetting per Ohio Rev. Code §2923.03(A)(2), may be stated in terms of the principal offense. Ohio Rev. Code §2923.03(F) (Page 1982). Appellant was charged as an aider and abettor to gross sexual imposition regarding Vicki Steadman. Appellant was in the room when Otis started kissing Ms. Steadman against her will and when he took her into the bedroom. Tr. 325-26. Our review of all the evidence causes us to conclude that a jury could reasonably find beyond a reasonable doubt that appellant aided and abetted the gross sexual imposition of Ms. Steadman.

As to the kidnapping charge, appellant placed the want-ads in the newspaper, Tr. 469; appellant insisted on picking the victims up at their homes, Tr. 143, 314; appellant requested

both victims to bring overnight bags, Tr. 144, 317; appellant told both victims they were going to Shaker Heights when, in fact, they did not; Ms. McNea asked to go home, but appellant told her she could not, Tr. 153. 159; and appellant was present during the talk of prostitution, Tr. 159. Our review of all the evidence leads us to conclude that a jury could reasonably find beyond a reasonable doubt that appellant committed kidnapping by deception. Appellants assignments regarding sufficiency of the evidence are overruled.

IX.

Appellant's tenth assignment of error is that:

> THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT IMMEDIATELY SENTENCED THE DEFENDANT TO MAXIMUM TERMS OF IMPRISONMENT FOR EACH OF THE OFFENSES FOR WHICH SHE WAS CONVICTED.

As a general rule, an appellate court will not review a trial court's exercise of discretion in sentencing absent an abuse of that discretion. *City of Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22. It is an abuse of discretion for the trial court to ignore the factors set forth in Ohio Rev. Code §2929.12(A) and to arbitrarily impose sentence. *State v. Gregley,* No. 45881 (8th Dist. Ct. App. Sept. 22, 1983); cf. *Cincinnati v. Clardy* (1978), 57 Ohio App. 2d 153 (abuse of discretion when statutory factors are not considered in misdemeanor sentencing). However, a record that is silent as to whether the trial court considered the statutory factors may not necessarily constitute an abuse of discretion. *State v. Cole* (1982), 8 Ohio App. 3d 416, 418. It is clear from the record in this case that the trial court did not ignore the statutory sentencing factors. Sentencing Tr. 2-3. Appellant's tenth assignment of error is thus overruled.

X.

Appellant's eleventh assignment of error is that:

> THE COURT COMMITTED PREJUDICIAL ERROR IN SENTENCING THE DEFENDANT FOR TWO COUNTS OF GROSS SEXUAL IMPOSITION AS TO MAUREEN McNEA.

The record indicates that the offenses against Ms. McNea were committed separately or with a separate animus as to each sexual contact thus permitting conviction on both counts. Tr. 172-75. See *State v. Barnes* (l981), 68 Ohio St. 2d 13. This assignment of error is overruled.

XI.

Appellant's twelfth assignment of error is that:

> THE COURT COMMITTED PREJUDICIAL ERROR AND SUBJECTED THE DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT BY IMPOSING A SENTENCE WHICH EXCEEDED THE STATUTORY MAXIMUM SENTENCE.

Appellant argues that the imposition of consecutive sentences is arbitrary and unreasonable amounting to cruel and unusual punishment.

Ohio Rev. Code §2929.41(B)(1) permits the trial court to order consecutive sentences. Therefore, the imposition of consecutive sentences is within the discretion of the trial court. We find no abuse of discretion in the trial court's decision. However, when consecutive sentences are specified, Ohio Rev. Code §2929.41(E)(2) provides that the consecutive terms shall not exceed an aggregate minimum of fifteen years. Appellant was sentenced to an aggregate minimum of twenty years. The aggregate minimum in excess of fifteen years is

hereby vacated. Appellant's assignment of error is sustained in this respect.

XII.

Appellant's thirteenth assignment of error is that:

> THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN SHE WAS CONVICTED AND SENTENCED FOR KIDNAPPINGS AS FIRST DEGREE FELONIES.

Kidnapping is a felony of the second degree only if the victim is released in a safe place unharmed. Ohio Rev. Code §2905.01(C) (Page 1982). Appellant argues that there is no evidence in the record that either victim was harmed; therefore, appellant should not have been convicted of kidnapping in the first degree. The burden of proof, however, is on the appellant to show that the victims were released in a safe place unharmed. *State v. Cornute* (1979), 64 Ohio App. 2d 199. The record amply demonstrates the victims were harmed. Appellant's last assignment of error is overruled.

XIII.

The sentences imposed by the trial court on Wendy and Otis Rodgers also violated Ohio Rev. Code §2929.41(E)(2). They were also sentenced to an aggregate minimum term of twenty years. That error is noticed pursuant to Crim. R. 52(B).

Appellants' sentences are modified to comply with Ohio Rev. Code §2929.41(E)(2) and, as modified, appellants' convictions are affirmed. This case is remanded to the trial court for the purpose of amending its entry to provide for an aggregate minimum sentence for each defendant of not more than 15 years.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NOS. 47146, 47147, 47151

State of Ohio, Plaintiff-Appellee	:	
v.	:	CONCURRING OPINION
Wendy Rodgers, Otis Rodgers, Pamela Green, Defendants-Appellants	:	

DATE OF ANNOUNCEMENT OF DECISION:

DAY, C.J., CONCURRING:

I concur in judgment but add a few words to highlight a point. This case presents a vivid example of why it is good, virtually essential, practice to provide separate non-associated counsel for multiple defendants. And, when counsel are provided, it should be routine, non-varying practice to require their presence at every point in the trial absent clear waiver by the client.

It is ordered that appellee recover of appellant(s)its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, J., CONCURS
DAY, C.J., CONCURS IN JUDGMENT ONLY
(See Concurring Opinion Attached)

/s/ Joseph J. Nahra
Judge
Joseph J. Nahra

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-1714

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DOROTHY ARN,

Petitioner,

vs.

PAMELA D. GREEN,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PAUL MANCINO, JR.
Attorney for Respondent
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Suite 1001
Cleveland, Ohio 44113
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STATEMENT OF FACTS

In this case the petitioner set forth a statement of facts. However, the statement of facts with reference to the particular matter at issue should include those portions of the record which show affirmatively the absence of respondent's counsel.

At the time the trial was commenced in the present case respondent's counsel, John Carlin, who was involved in the trial of a death penalty case in another courtroom in the same Court of Common Pleas of Cuyahoga County. That was the case of State v. Mapes. In the officially reported opinion of the Mapes case a matter of the presence of John Carlin his performance is not set forth. See State v. Mapes, 19 Ohio St. 3d 108, 484 N.E. 2d 140 (1985), cert. denied, 106 S. Ct. 2905 (1986).

The record in this case shows that her attorney was absent during many phases of the trial. At the very commencement of the trial, John Carlin was not present and the trial commenced at that point without counsel being present. (Tr. 4).

The first matter to be heard and considered by the court was the motion to suppress. The motion to suppress commenced on May 31, 1983. (Tr. 3).

The entire motion to suppress was heard and argued and decided without the presence of counsel. Sgt. Joseph Markey

testified and was only cross-examined by counsel for the other co-defendants. (Tr. 68).

In the meantime between witnesses a jury panel was brought into the courtroom and even sworn. (Tr. 69-70). Thereafter, Detective Norman Sherwood testified, (Tr. 78-84). Argument was made by counsel. (Tr. 86-121).

The court reserved ruling on the motion until June 1, 1983. At that time, the court remarked to counsel concerning the absence of defense counsel:

> Mr. Shaughnessy, do you know whether or not Mr. Carlin is going to be available first thing in the morning?
>
> MR. SHAUGHNESSY: I haven't had a chance to cal. If the Court permits, I will pick up your phone right here and call, I would assume so, sir. (Tr. 123).

Counsel did not at all appear on May 31, 1983 a critical portion of the case. Counsel did appear on June 1, 1983. (Tr. 131).

Later, the record reflects that counsel was absent and the following colloquy took place:

> THE COURT: Let's take Mr. Carlin. I note for the record that you are on your feet. Apparently you have something to say to the Court. You may proceed.
>
> MR. CARLIN: Yes, Your Honor. In view of the fact that I was not available yesterday afternoon when the Motion to Suppress was heard, I would just like for the purposes of appeal and for the record to join in the Motion to Suppress.
>
> I don't know whether it was on the record or not, as counsel for Pamela Green. (Tr. 313).

Second, counsel also absented himself during the testimony of one of the main prosecution witnesses, Maureen McNea. Cross-examination was had by counsel for the co-

defendant, but there was no cross-examination by counsel for the respondent, Pamela Green. (Tr. 296).

The court was aware of the absence of counsel and this matter was brought to the attention of the court, then the following colloquy took place:

> MR. SHAUGHNESSY: Your Honor, in this matter, its now twenty minutes to 4:00. Counsel for Otis and Wendy Rodgers, having conducted a somewhat brief cross-examination from 2:00, in any event, it appears that we were, of course, hoping that Mr. John F. Carlin, attorney for Pam Green, would be back in time to resume his cross-examination.
>
> That not being the case, the record should reflect that he was in a chair case, a murder case, I think we have already mentioned, the State of Ohio vs. David Mapes, before the Honorable James Patrick Kilbane.
>
> That trial concluded with a verdict of guilty on Friday. The sentencing portion, in which the jury is involved, because it is a chair case, was supposed to have taken, supposed to be a week interval everyone thought.
>
> Now, it didn't work out that way. Mr. Carlin then has been called back, and he has had to absent himself from the courtroom. I don't know what he might ask the Court to do.
>
> THE COURT: I can answer that.
>
> MR. SHAUGHNESSY: But I would ask you if you would do this. At least have the young lady available. Carlin may want to recall her. I don't know.
>
> THE COURT: Let the record reflect the Court, in anticipation of this problem with Mr. Carlin, discussed it with him prior to the lunch break, and he informed me that he would be content with Mr. Shaughnessy's cross-examination on behalf of all three defendants, so with that assurance, the Court feels that one cross-examination is sufficient. (Tr. 298-99).

When it was obvious that the respondent did not have counsel and certainly the trial should not proceed without counsel the respondent herself brought this to the attention of the court. (Tr. 305-06).

When counsel did return on the following day, June 3, 1983 she did express her desire to retain new counsel. (Tr.

308). Later, respondent moved for a mistrial due to the absence of counsel. (Tr. 403-04).

Later when the exhibits were being offered John Carlin again was not present. (Tr. 478-79). This was important because there was a stipulation concerning the respondent, Pamela Green, which was stipulated to by counsel for the co-defendant, Thomas Shaughnessy. (Tr. 479).

Moreover, when the motion to suppress was renewed, counsel again was not present. (Tr. 480-88, 518-19).

Again later when exhibits were being admitted John Carlin again was not present. (Tr. 510).

Later during the deliberation of the jury there was a question to be asked by the jury. Attorney Thomas Shaughnessy was present, but John Carlin was not present. (Tr. 923-27).

Certainly, it cannot be said under these circumstances that the respondent was afforded the effective assistance of counsel. The court clearly had the opportunity in this case to correct the situation by granting a mistrial as to the respondent, Pamela Green, but rejected that opportunity. Under these circumstances the respondent has been denied the effective assistance of counsel and therefore her conviction is constitutionally invalid.

ARGUMENT
I

THE SUPREME COURT SHOULD NOT ENTERTAIN THIS APPEAL DUE TO THE FACT THAT THE MATTER HAS BECOME MOOT.

This is an appeal by the petitioner from the judgment of the United States Court of Appeals for the Sixth Circuit affirming the granting of a petition for a writ of certiorari. Respondent had originally been sentenced by the Court of Common Pleas of Cuyahoga County to a term of imprisonment.

In this case, after the United States District Court for the Northern District of Ohio, Eastern Division, granted the petition for writ of habeas corpus, respondent moved for release on bond pending an appeal by the petitioner to the United States Court of Appeals. This motion for release of bond was denied by the United States District Court.

Thereafter a motion for release on bond was filed with the United States Court of Appeals for the Sixth Circuit. The petitioner opposed any release on bond in this case and the United States Court of Appeals for the Sixth CIrcuit denied the motion for release on bond.

Thus, during these proceedings the respondent has remained in jail.

During the pendency of the appeal, on May 23, 1986 respondent was released from imprisonment at the Woman's Correctional Facility at Marysville, Ohio. She was released to a halfway house in Columbus, Ohio until January 5, 1987. On January 5, 1987 her status was that of a parole release.

She remained on parole until February 10, 1987 when she was released from supervision. Given the fact that respondent is no longer in custody and any parole supervision has been terminated this matter has now become moot.

Under applicable Ohio law even if the conviction were overturned and the respondent were retried and convicted of the original offense she would have to be released to her present condition, that is, of no supervision and outright release. In Ohio where a conviction has been overturned and the party has been released on parole or any other status short of imprisonment, the court, upon resentencing, is required to put the person back in the same position. Thus, in State v. Peck, 26 Ohio App. 3d 133, 498 N.E. 2d 1087 (1985), the court ruled that where one had been sentenced to a term of imprisonment and was released on parole and his conviction thereafter overturned and the person was again resentenced by the court the person had to be resentenced to parole and not to jail.

Therefore, under applicable Ohio law even if the respondent were convicted again she would have to be placed in the same status as she is now. Consequently, under these circumstances there is nothing more than a moot situation and the court cannot consider a moot case.

In these circumstances the federal courts are without power to decide questions that cannot affect the right of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971).

The situation presented in this case is similar to that considered in DeFunis v. Odegaard, 416 U.S. 312 (1974). In that case an action was bought by an unsuccessful applicant to a state university law school challenging the denial of admission to the law school on the ground that the admissions policy was unconstitutional. During the course of the litigation and by the time the matter reached the Supreme Court the student was presently in his last quarter of his final year of law school and that any decision on the merits would not prevent the graduation. Under these circumstances the case was deemed moot when attempted to be reviewed by the Supreme Court.

The same applies in this case. Had the respondent been released on bond the matter would not have become moot. However, because the petitioner opposed the release of the respondent on bond after the United States District Court had granted the petition for writ of habeas corpus the matter has now become moot. Therefore there is no case or controversy present before this court for consideration. In cases involving writs of habeas corpus with respect to state cases and where the petitioner had been released on parole or outright the matter has become moot. Marchese v. State of California, 545 F. 2d 645 (9th Cir. 1976).

II

WHERE THE RECORD SHOWS MANY ABSENCES OF COUNSEL AND THE FAILURE OF A TRIAL COURT TO ALLOW COUNSEL TO ATTEND THE PROCEEDINGS A DEFENDANT HAS BEEN DENIED THE ASSISTANCE OF COUNSEL AND IS ENTITLED TO A NEW TRIAL REGARDLESS OF A DEMONSTRATION OF PREJUDICE FOR PREJUDICE IS PRESUMED UNDER THESE CIRCUMSTANCES.

In this case, both the District Court and the Court of Appeals ruled that prejudice was not required. This would appear to be a correct assessment of the issue. Even with the absences of counsel it would seem that prejudice would, at a minimum have to be presumed under these circumstances.

While the United States Supreme Court has stated that prejudice may be a proper inquiry where counsel has performed during the trial prejudice is presumed when there is an absence of counsel.

In United States v. Cronic, 104 S. Ct. 2039 (1984) the Supreme Court stated that prejudice is presumed when there is a denial of counsel:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974) because the petitioner had been "denied the right of effective cross-examination which "'would be constitutional error of the first magnitude and no amount of showing o f want of prejudice would cure it.'" Id., at 398 (Citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1,3 (1965). 104 S. Ct. at 2047.

In another case decided by the United States Supreme Court on the same date, Strickland v. Washington, 104 S. Ct. 2052 (1984) the Supreme Court again held that if prejudice is a proper inquiry in such circumstances, prejudice may be presumed:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at _____, _____, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. Id., at _____. Moreover, such circumstances involve impairments of the Sixth Amendment right that re easy to identify and, for that, reason and because the prosecution is directly responsible, easy for the government to prevent. 104 S. Ct. at 2067.

C O N C L U S I O N

This case presents no issues that are needed to be considered by the Supreme Court. The matter has been considered in depth both by the District Court and by the Court of Appeals. However viewed, respondent was denied the assistance of counsel and was entitled to the grant of a writ of habeas corpus. Therefore the petition for writ of certiorari should be denied.

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S E R V I C E

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari, was mailed to Rita S. Eppler, Attorney for Petitioner, on this 13 day of July, 1987.

Attorney for Respondent

APPENDIX "A" ORDER OF U.S. COURT OF APPEALS DENYING BOND

Nos. 85-3745, 85-3796

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

APR 3 1986

JOHN P. HEHMAN, Clerk

PAMELA D. GREEN,

Petitioner-Appellant,
Cross-Appellant,

v.

DOROTHY J. ARN,

Respondent-Appellant,
Cross-Appellee,

ORDER

This matter is before the Court upon the petitioner-appellee's motion for release pending appeal or, alternatively, motion to vacate a stay of the district court's order of August 16, 1985. The order granted petitioner's petition for writ of habeas corpus because she was denied effective assistance of counsel, but petitioner remains incarcerated because the court subsequently denied bail pending appeal. The state filed a memorandum in opposition.

Upon consideration of the record, the Court concludes that the stay should not be vacated. Cagle v. Davis, 520 F. Supp. 297, 311 (E.D. Tenn. 1980), aff'd mem., 663 F.2d 1070 (6th Cir. 1981). Similarly, this Court concludes that the district court did not abuse its discretion in denying bail. Federal Rules of Appellate Procedure 23(c) provide:

> Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or

> without surety, unless the court or justice or judge rendering the decision, or the court of of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

The cases interpreting this rule have drawn a distinction between those cases in which an incarceration results from a judicial determination of guilt and those in which it is based on other reasons. Where the habeas relates to an incarceration that follows trial, conviction and sentence there needs to be "some circumstance making this application exceptional and deserving of special treatment in the interest of justice." Aronson v. May, 85 S. Ct. 3, 5 (Douglas, Circuit Justice, 1964). See also Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985); Glynn v. Donnelly, 470 F.2d 95, 97-98 (1st Cir. 1972).

Here, the evidence against petitioner at trial was strong and the respondent has indicated that petitioner will be retried if the district court's decision granting the writ is not reversed. Under these facts, the "special circumstances" making this application "exceptional and deserving of special treatment" are lacking. Cf. Jago v. United States District Court, Northern District of Ohio, 570 F.2d 618 (6th Cir. 1978) (period for new trial had expired).

IT IS ORDERED that the motion to vacate the stay is DENIED.

IT IS FURTHER ORDERED that the motion for bail is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Hehman II
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PAMELA D. GREEN	)	CASE NO. C84-3026
	)	
Plaintiff	)	JUDGE SAM H. BELL
	)	
-v-	)	
	)	O R D E R
DOROTHY J. ARN, SUPT.	)	
	)	
Defendant	)	

For the purpose of clarifying the record, the court hereby denies the petitioner's motion for release on bail pending appeal. The reasons for denying this motion are set forth in the court's previous orders of August 16, 1985 and September 17, 1985.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
AKRON